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The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes

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THE *GROSS* BEAST OF BURDEN OF PROOF: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes

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Scholarly and public attention to the burden of proof and jury instructions has increased dramatically since the Supreme Court's 2009 decision in Gross v. FBL Financial Services, Inc. Gross *holds that the so-called mixed-motive jury instruction, which we call the motivating factor instruction, is not available in age, and possibly disability and retaliation cases. The decision prompted an outcry from the plaintiffs' bar and Congress has proposed legislation to overturn* Gross. *Despite the outcry, a simple question persists: Does the motivating factor jury instruction influence case outcomes? Results from our experimental mock jury study suggest that such jury instructions do influence outcomes in employment discrimination cases. Moreover, we also found a defect in the standard jury instruction that neither* Gross *nor the proposed legislation corrects or even addresses: the motivating factor instruction misleads juries and fuels unintended costs and fee awards to employees. Our paper proposes two corrections, one for Congress and one for the courts, either of which would correct the motivating factor defect and provide more certainty and fairness for employment discrimination litigants.*

Is it really lawful for an employment decision to be motivated by age, but not by race, sex, color, national origin, or religion? The U.S. Supreme Court concluded in *Gross v. FBL Financial Services, Inc.*[1] that such was Congress's intent and is, therefore, the law.[2] On the other hand, because *Gross* addresses the burden of proof in "mixed-motive" cases, it could be a

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1. 129 S. Ct. 2343 (2009).

2. *Id.* at 2352 ("We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action.").

hollow decision.[3] Despite at least nine Supreme Court cases,[4] hundreds of lower court opinions, and thousands of law review pages,[5] some claim that the burden of proof and the accompanying jury instructions in employment discrimination cases are meaningless.[6] Jurors, many argue, simply decide who should prevail *regardless* of jury instructions and the burden of proof.[7] This argument generates two research questions: (1) what is the law with regard to burden of proof? and (2) does the burden of proof influence outcomes in employment discrimination cases?

This Article addresses both questions. In the first section we examine the law's path from *McDonnell Douglas v. Green*,[8] to *Price Waterhouse v. Hopkins*,[9] to the Civil Rights Act of 1991,[10] to *Desert Palace, Inc. v.*

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3. *See id.* at 2350 ("Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim.").

4. *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

5. *See, e.g.*, Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981); Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175 (2001); Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the* McDonnell Douglas *Monolith*, 44 HOUS. L. REV. 349 (2007).

6. *See* Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 791–93 (2006) ("One place where confusion over the burden-shifting framework's proper use is most visible relates to jury instructions. When discrimination cases go to trial, the *McDonnell Douglas* test raises unnecessary complications for both the judge and the jury. Even thirty years after the test's creation, courts continue to struggle with how to incorporate its rationale into jury instructions. Indeed, the circuits are currently split regarding how and whether to instruct the jury on the three-part framework. Some courts incorporate *McDonnell Douglas* into the jury instructions by instructing the jury on the changing burdens of production and persuasion. However, most circuits have issued opinions indicating that *McDonnell Douglas* should not be used in jury instructions . . . . The best argument against construing *McDonnell Douglas* as an evidentiary framework is the fact that the majority of circuits discourage the use of the three-part burden-shifting framework in jury instructions. Thus, if the test is designed to help factfinders sift through evidence to determine whether discrimination has occurred, the courts have essentially made the test meaningless at trial in cases presented to a jury. In these cases, *McDonnell Douglas* has become an evidentiary standard without a factfinder.") (footnotes omitted); *see also* Gerrilyn G. Brill, *Instructing the Jury in an Employment Discrimination Case*, 1998 FED. CTS. L. REV. 2, pt. 4, § B, ¶ 3 (noting that once the case is submitted to the jury, the *McDonnell Douglas* formulation is irrelevant).

7. *See* Brill, *supra* note 6.

8. 411 U.S. 792 (1973).

9. 490 U.S. 228 (1989).

10. 42 U.S.C. § 1981 (2008).

Costa,[11] and finally, to *Gross* and its progeny. Tracking the evolution of the mixed-motive jury instruction reveals that while the mixed-motive (or as we call it the motivating factor) instruction is (or should be) available in the vast majority of Title VII discrimination cases,[12] after *Gross* it is not available in the Age Discrimination in Employment Act (ADEA),[13] and perhaps unavailable in the Americans with Disabilities Act (ADA),[14] and retaliation cases.[15] Instead, after *Gross*, employees pursuing ADEA, and possibly ADA and retaliation, claims against employers will receive the so-called pretext jury instructions. The existence of this anomaly prompts our second research question regarding whether jury instructions matter in terms of outcomes.

In section two, we present results from a two-year experimental study on the burden of proof and its potential influence on employment discrimination litigation outcomes. Findings from our study suggest that while the outcomes (involving employer liability) are comparable, plaintiffs in cases with a motivating factor jury instruction were significantly more likely to receive litigation costs and attorney fees than plaintiffs in cases with the pretext jury instruction.[16] What makes this finding critically important is that leading practitioners commonly construe many employment discrimination claims as "fee cases."[17] In so-called "fee cases," the costs and fees incident to an employer's defense approach sometimes exceed the potential damages available to the plaintiff. Thus, in these instances and from an employer's economic perspective, whether an employee will be awarded costs and attorney fees is more important than the liability determination.

Our findings imply that jury instruction variations effectively "discriminate" against ADEA (and possibly ADA and retaliation) plaintiffs

11. 539 U.S. 90 (2003).

12. 42 U.S.C. § 2000e-2(a)(1) (2008).

13. 29 U.S.C. §§ 621–634 (2009).

14. 42 U.S.C. §§ 12101–12213 (2008).

15. 29 U.S.C. § 623(d); 42 U.S.C. § 2000e-3(a) (1972); 42 U.S.C. § 12203(a) (1990). *But see* Smith v. Xerox, No. 08-11115, 2010 U.S. App. LEXIS 6190, at *16–19 (5th Cir. Mar. 24, 2010) (holding that the mixed-motive instruction is available in Title VII retaliation cases).

16. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

17. *See* David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1574 n.88 (2005); David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 93 n.106 (1999). In some cases back pay may be marginal, because the employee earned a modest wage or quickly replaced his job, but the litigation costs may still run hundreds of thousands of dollars. Other times, both the back pay and the attorney fees are high. It is very rare, if not impossible, for there to be high back pay and low fees.

by excluding them from the Title VII windfall that misleads jurors in ways that favor employees over employers. One potential consequence is that plaintiff lawyers may shy away from ADEA cases[18] and are less inclined to take ADA[19] and retaliation cases.[20] Another consequence is that employers might be more likely to settle meritless Title VII cases to reduce their exposure to employee cost and fee awards. Along with highlighting the burden of proof's import in the employment discrimination context, our study's findings also illustrate the need for changes in the law that endeavor to: (1) provide a coherent standard for the different types of discrimination and (2) reduce the likelihood of juror misunderstanding.

In section three, we consider proposals designed to reduce current problems associated with jury instructions in employment discrimination cases. Notably, Congress is currently considering a bill, the Protecting Older Workers against Discrimination Act (POWDA), which seeks to overturn *Gross*.[21] Given the current political climate, most correctly assume that the prospects for any new employment law bill being passed are, at best, dim.[22] We contend, however, that POWDA may have a better chance of enactment than other employment-related bills because it protects older Americans and is deficit-neutral.

Unfortunately, even if passed, as currently drafted the POWDA solves one problem while ignoring another. While only Congress or the Supreme Court can overturn *Gross*, trial courts can, nonetheless, solve the juror misunderstanding problem by providing jurors with fuller information about the practical economic consequences of their decisions. Access to more information should reduce the likelihood of jurors unintentionally awarding costs and fees to employees in Title VII cases, diminish employers'

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18. ADA cases are regarded as one of the most difficult types of cases to pursue. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99–100 (1999) (finding that ADA plaintiffs' success rates at trial and on appeal are worse than those of plaintiffs in comparable areas of law—"only prisoner rights cases fare as poorly").

19. ADEA cases are considered employee-friendly, largely because of the damages scheme. *See infra* notes 42–53 and accompanying text.

20. Plaintiffs favor retaliation cases. *See* Wayne N. Outten et al., *When Your Employer Thinks You Acted Disloyally: The Guarantees and Uncertainties of Retaliation Law*, 693 PRAC. L. INST.-LITIG. 151, 153 (2003) ("In part due to the success rate of retaliation claims before juries, more and more plaintiffs are adding retaliation to their discrimination and whistle blower claims.").

21. Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h111-3721.

22. *See* Susan McGolrick et al., *Possible Changes in Law, Federal Labor Relations Discussed*, 14 COLLECTIVE BARGAINING BULL. (BNA) 149, para. 6 (Dec. 3, 2009) (stating that "[t]here have always been 'deep divisions' and controversy in the field of labor law").

incentive to settle such claims, and dampen plaintiff lawyers' motivation to preference Title VII cases over ADEA, ADA, and retaliation cases.

I. THE BURDEN OF PROOF IN DISPARATE TREATMENT CASES UNDER TITLE VII AND THE ADEA

Most employment discrimination cases fall into two general categories: disparate treatment (intentional discrimination)[23] and disparate impact (unintentional discrimination).[24] Disparate impact (also described as adverse impact) occurs when a company has a policy or practice that, while neutral on its face, adversely affects a protected class. In a leading case, *Griggs v. Duke Power Co.*, an employer required employees who wanted to work in any but the lowest job classification to have a high school diploma and pass a standardized test.[25] While passing a test or holding a high school degree remains facially neutral, these two standards eliminated a substantially greater number of black employees than white employees from consideration.[26] In *Griggs*, the employer argued that it could not be found liable absent intent to discriminate.[27] The Court rejected this argument and held that if the plaintiff using statistics proves that a neutral policy or practice has an adverse impact on a protected class, the employer must in turn prove that such a policy is justified as a "business necessity."[28]

While the Supreme Court has addressed adverse impact cases on a few occasions,[29] with two of these rulings[30] fueling[31] the Civil Rights Act of

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23. First explained by the courts in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–07 (1973), based on an interpretation of § 703(a)(1) of Title VII.

24. The Supreme Court described this method of proving discrimination in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–35 (1971), based on a construction of § 703(a)(2) of Title VII.

25. *Griggs*, 401 U.S. at 427–28.

26. *Id.* at 429–30.

27. *Id.* at 428–29.

28. *Id.* at 431 ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). Courts have continued to struggle with defining the business necessity justification. *See, e.g.*, Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 658–61 (1989); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425–36 (1975); Lanning v. Se. Pa. Transp. Auth., 308 F.3d 286, 289 (3d Cir. 2002); and Congress's subsequent action with the CRA of 1991. For a further discussion of the business necessity defense, see generally Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387 (1996); Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 320–34, 348–52 (1998).

29. *See Wards Cove*, 490 U.S. at 645–61; Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986–1000 (1988); Connecticut v. Teal, 457 U.S. 440, 442–56 (1982); N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 577–94 (1979); Dothard v. Rawlinson, 433 U.S. 321, 328–37

1991 (CRA of 1991),[32] the vast majority of discrimination cases are disparate treatment or intentional discrimination cases.[33] Consistent with the distribution of employment discrimination cases in the real world, our study focuses on the burden of proof in disparate treatment cases.

Disparate treatment cases are particularly difficult to assess because fact finders must ascribe motivation to the actions of the employer.[34] Since few, if any, employers admit to an unlawful intent, and because most employers are now sophisticated enough to avoid creating the proverbial smoking gun that would easily establish unlawful intent,[35] the courts are typically left to decide how to determine whether an employer intentionally discriminated. Before examining how courts allocate the burden of proof, it is important to briefly explore the three main discrimination statutes which structure much of the employment law litigation.

Title VII of the Civil Rights Act of 1964 (Title VII) makes it unlawful to discriminate on the basis of sex, race, religion, color, and national origin.[36] The ADEA makes it unlawful to discriminate against employees and applicants over forty years of age.[37] The ADA makes it unlawful to discriminate against employees who are disabled under the law.[38] Each of the statutes prohibits retaliation against those who oppose such

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(1977); *Albermarle*, 422 U.S. at 425; Espinoza v. Farah Mfg. Co., 414 U.S. 86, 87, 92 (1973); *Griggs*, 401 U.S. at 425–36.

30. *See Wards Cove*, 490 U.S. at 645–61; *Watson*, 487 U.S. at 982–1000.

31. *See* Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of* Griggs, *a Partial Return to* Wards Cove, *or All of the Above?*, 43 CASE W. RES. L. REV. 287, 289 (1993) (acknowledging that the Act was a response to *Wards Cove*); Charles Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1518 n.58 (2004) ("The legislative history of the 1991 Civil Rights Act is replete with attacks on *Wards Cove*.").

32. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 2 (1991) (codified as amended at 42 U.S.C. § 1981 (2008)) ("[T]he decision of the Supreme Court in [*Wards Cove*] has weakened the scope and effectiveness of Federal civil rights protections.").

33. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991) (illustrating that in 1989 only 101 of 7,613 Title VII discrimination cases were tried under disparate impact theory).

34. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) ("The ultimate question in every discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.").

35. Hollander v. Am. Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990) ("Because employers rarely leave a paper trail—or 'smoking gun'—attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer.") (citations omitted).

36. 42 U.S.C. § 2000e-2 (2008).

37. 29 U.S.C. § 631(a)–(b) (1989).

38. 42 U.S.C. § 12112(a) (2008).

discrimination or participate in discrimination litigation.[39] For all intents and purposes, the ADEA and ADA amended Title VII by adding two new protected classes.[40] In fact, Congress expressly did this with respect to the coverage and damages set forth in the ADA. Although Congress could have accomplished this with the ADEA as well, Congress chose a different path. Instead of following Title VII, Congress modeled the ADEA after the Fair Labor Standards Act of 1935 (FLSA).[41] The effect of this, unlike *Gross*, was to make the ADEA friendlier for plaintiffs and their lawyers and more expensive for employers.

In 1967 (when Congress passed the ADEA), damages flowing from Title VII liability were limited to back pay, reinstatement, costs, and fees.[42] Moreover, there were no jury trials. The ADEA provides for the same damages as Title VII and, in addition, liquidated damages if the conduct is deemed willful.[43] Liquidated damages equal back pay; thus, for willful conduct, prevailing employees receive double back pay.[44]

The concept of doubling back pay if the conduct is willful, however, is not logical in ADEA cases. Under the FLSA it is possible to intentionally, while not willfully, violate the statute.[45] An employer can refuse to pay overtime to an employee that the company wrongfully, but truly believes is exempt.[46] Only in extraordinarily few cases do employers intentionally base a decision on age, but do not willfully run afoul of the statute.[47] The ADEA

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39. 29 U.S.C. § 623(d) (2008); 42 U.S.C. § 2000e-3(a) (1972); 42 U.S.C. § 12203(a) (1990).

40. TIMOTHY P. GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 460–61 (Wolters Kluwer 2007) (discussing the two acts as links in a series of employment discrimination laws beginning with Title VII).

41. Sperling v. Hoffmann-La Roche, Inc., 24 F.3d 463, 468 (3d Cir. 1994) ("Congress borrowed portions of many other statutes[, incorporating] parts of the FLSA.").

42. The Civil Rights Act of 1991 allowed for compensatory and punitive damages for Title VII intentional discrimination. 42 U.S.C. § 1981a(a)–(c) (1991). *But see* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 529–30 (1999) (restricting the extent of punitive damages for Title VII and ADA).

43. 29 U.S.C. § 626(b) (2009); *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 614 (1993); Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 777 (7th Cir. 2001) ("Under the ADEA, courts are required to assess liquidated damages in the same amount as the compensatory damages if the employer's violation of the statute was 'willful.'").

44. *See* 29 U.S.C. § 626(b).

45. *See* 29 U.S.C. § 260 (1974). For the penalties resulting from "willful" violations, see 29 U.S.C. § 216(a) (2008).

46. 29 U.S.C. § 260; *see also* 29 C.F.R. § 790.22(b)–(c) (2010).

47. For examples of approved age-based assessments, see *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 411–12 (1985) (approving age classifications in the narrow instance of a "bona fide occupational qualification") and *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (stating the bona fide occupational qualification was "meant to be an extremely narrow exception to the general prohibition").

also provided for jury trials in 1967. As a consequence, the ADEA, prior to *Gross* and the CRA of 1991, was, owing to congressional intent, a much more potent statute for employees than Title VII.

The CRA of 1991 added jury trials and punitive and compensatory damages to Title VII.[48] The amount of punitive damages available to successful litigants is a function of the size of an offending employer's workforce.[49] Damages for companies with fewer than 100 employees are capped at $50,000.[50] The cap increases to $300,000 for employers with more than 500 employees, and there are different caps for those with more than 100 and fewer than 500 employees.[51] Thus, a thirty-eight-year-old woman who earns $2,000,000 annually from her investment firm with forty employees will receive a maximum of $4,050,000 if she is fired because of her sex and is out of work for two years. If she were forty-two, fired because of her age, and out of work for two years, however, she could receive $8,000,000. Damages under the ADA mirror those provided by Title VII.[52]

Aside from damages and the fact that Title VII and the ADA cover employers with fifteen employees or more, and the ADEA covers those with twenty employees or more, the statutes in application are seemingly identical.[53] Moreover, once a case reaches the courts, the method of proof is the same.[54] Thus, a forty-two-year-old female paraplegic could bring a discrimination case under the three statutes (plus state and local laws) under the same burden of proof rubric. Before we explain the evolution of this rubric, however, it is important to examine the burden of proof.

Although Title VII, the ADEA, and the ADA each expressly state that employers may not discriminate because of the certain characteristics protected by the statutes, the statutes do not explain how parties prove their

48. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 102(b) (1991) (codified as amended at 42 U.S.C. § 1981 (1991)).

49. *Id.* § 102(b)(3).

50. *Id.* § 102(b)(3)(A).

51. *Id.* § 102(b)(3)(B)–(D).

52. GLYNN, *supra* note 40, at 621 (generalizing that Title VII and the ADA have similar remedial options).

53. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2354 (2009) (Stevens, J., dissenting) ("The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply 'with equal force in the context of age discrimination, for the substantive provisions of the ADEA . . . .'") (citations omitted).

54. *See* William R. Corbett, *The "Fall" of* Summers, *the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 322 n.78 (1996) (showing disparate treatment discrimination applies to Title VII, ADA, ADEA, and all require same proof structure).

case, which side has the burden of proof, or how much, if any, discrimination is tolerated. Thus, the methods, burdens, and standards of proof were developed by the courts in a series of Supreme Court and lower court decisions, modified by Congress in the CRA of 1991, and then subsequently refined by *Costa*, *Gross*, and a host of lower court decisions.[55] To fully understand the current state of the burden of proof, it is necessary to understand its evolution, beginning with *McDonnell Douglas*.

In *McDonnell Douglas*, the Court established the method of proof in discrimination cases. The Court concluded that to prove discrimination, employees first had to establish a prima facie case of discrimination. To prove a prima facie case, employees had to prove that: (1) they belonged to a protected class; (2) they were minimally qualified for the position in question and that they applied; (3) they suffered an adverse employment decision; and (4) the job remained open or the job was filled by an applicant outside the protected class.[56] In subsequent years, courts tweaked the fourth element to be applicable to termination cases by stating the employee had to prove that similarly situated employees outside the protected class engaged in similar conduct, but were treated differently.[57]

The establishment of the prima facie case creates a rebuttable presumption that the employer discriminated.[58] Employers can refute this presumption by producing (not proving) a legitimate non-discriminatory reason for the decision.[59] If the employer satisfies this burden, the employee could, in turn, prove discrimination by establishing that the real reason for

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55. For cases pre-*Costa*, see *Stella v. Mineta*, 284 F.3d 135, 146 (D.C. Cir. 2002) (holding that it is not necessary for a plaintiff to establish that she was replaced by a person outside of her protected class to satisfy the burden under *McDonnell Douglas*), *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996) (holding that there is a prima facie case even if one white worker is replaced by another white worker), *Hong v. Children's Memorial Hospital*, 993 F.2d 1257, 1261 (7th Cir. 1993), and *Johnson v. Group Health Plan, Inc.*, 994 F.2d 543, 545–46 (8th Cir. 1993) (holding when a single employee is discharged, the plaintiff must present evidence of satisfactory work to meet the burden).

56. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) ("This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.").

57. *See* Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 673 (1st Cir. 1996) (phrasing the fourth prong as "replaced by another with similar skills and qualifications"); Lipsett v. Univ. of P.R., 864 F.2d 881, 899 (1st Cir. 1988) (crafting the language of the fourth prong as "the employer sought someone to perform the same work after he or she left"). Furthermore, the courts recognized that some employees may not apply for the jobs and thus, prong two was modified as well.

58. *McDonnell Douglas*, 411 U.S. at 802–03.

59. *Id.* at 802.

the decision was discrimination or that the reason articulated by the employer is pretextual—unworthy of belief.[60] *McDonnell Douglas* was questioned and refined in a number of subsequent decisions.[61] In *Texas Department of Community Affairs v. Burdine*,[62] the Court of Appeals held that the employer had to prove that: (1) the articulated reason was the real reason for the decision and (2) the person hired was more qualified than the plaintiff.[63] The *Burdine* court rejected this holding and reiterated that the employer need only articulate a non-discriminatory reason and that there was no obligation to hire the best candidate for a job.[64] Instead, the employer simply could not discriminate.[65]

In 1989, the Supreme Court confronted another genre of employment discrimination—the so-called mixed-motive case. In *Price Waterhouse v. Hopkins*,[66] the plaintiff, Ann Hopkins, alleged that despite her excellent performance she was denied partnership on two separate occasions because of her sex.[67] To prove her case, she presented evidence that in advising her how to succeed after her first failure, partners suggested that she, for example: (1) wear make-up; (2) get her hair done; (3) stop cursing; and (4) walk, talk, and act in a more feminine manner.[68] The employer argued that while plaintiff's performance was strong, her interpersonal skills were weak, and that the company did not promote associates to partnership who had such flaws.[69]

The Supreme Court accepted that the employer had both legitimate (the interpersonal skills) and illegitimate (the sex-based factors listed above) reasons for its conduct.[70] The question for the Court was what to do in such situations. The answer remained confusing and, in fact, the Court produced

60. *Id.* at 807.

61. *See* Reeves v. Sanderson Plumbing Prods., Inc, 530 U.S. 133, 153 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

62. 450 U.S. 248 (1981).

63. *Id.* at 251–52.

64. *Id.* at 256–59.

65. *Id.* at 257.

66. 490 U.S. 228 (1989).

67. *Id.* at 231–32.

68. *Id.* at 235.

69. Many partners simply did not get along with Hopkins and stated that, "She tended to alienate the staff in that she was extremely overbearing. Ann needs improvement in her interpersonal skills." Further, partners were bothered by "the arrogance [and] self-centered attitude that Ann projects." Other partners saw her positive attributes and her negatives, "I found her to be (a) singularly dedicated, (b) rather unpleasant." Cynthia Estlund, *The Story of* Price Waterhouse v. Hopkins, *in* EMPLOYMENT DISCRIMINATION STORIES 65, 69–70 (Joel W. Friedman ed., 2006).

70. *Price Waterhouse*, 490 U.S. at 234–35.

no majority opinion. Justice Brennan's plurality opinion established a new scheme for proving discrimination. Under the plurality opinion, plaintiffs satisfy their burden by proving that discrimination was a motivating part of the employer's decision.[71] The employer, according to Brennan's opinion, could escape liability by proving that it would have made the same decision regardless of the protected class.[72]

While six justices agreed with Brennan's two-prong and true burden-shifting approach, they did not agree on the standard needed for a case to fall into this classification. Accordingly, Justice O'Connor's concurrence was widely accepted as the functional holding in the case.[73] O'Connor's opinion states that the shift in the burden of proof inherent in the mixed-motive analysis is only available when the employee proves, with direct evidence, that the protected class was a substantial factor in the employer's decision.[74] Like Brennan's opinion, O'Connor's holding allowed employers to escape liability if they could prove that they would have made the same decision regardless of the protected class. The dissenting justices opposed burden-shifting and argued that the plaintiff always bore the burden of proving that discrimination was the "but for" reason for the employer's decision.[75]

In addition to arguing for a "but for" standard, dissenting Justices contended that the holding created unnecessary confusion for employers and courts.[76] To be sure, this argument has merit.[77] There were numerous cases where the parties argued whether certain evidence could be considered direct evidence. In addition, in other cases, seemingly meaningless words or even a court reporter's mistake determined the burden of proof.[78] Despite these problems, *McDonnell Douglas*, *Burdine*,

71. *Id.* at 240–42.

72. *Id.*

73. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (noting that the holding of the Court is the narrowest point on which five justices agree).

74. *Price Waterhouse*, 490 U.S. at 276–78 (O'Connor, J., concurring).

75. *Id.* at 282–84 (Kennedy, J., dissenting).

76. *Id.* at 286–87.

77. For the differing definitions of "direct evidence," see *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207–08 (10th Cir. 1999), *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995), and *Ostrowski v. Atlantic Mutual Insurance Cos.*, 968 F.2d 171, 181–82 (2d Cir. 1992). *See generally* Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651 (2000).

78. For how courts have analyzed certain "code" words, see *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006), *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1116–17 (9th Cir. 2004), and *Putman v. Unity Health Systems*, 348 F.3d 732, 735 (8th Cir. 2003). In *Austin v. Cornell University*, 891 F. Supp. 740 (N.D.N.Y. 1995), a deponent responded to the question: "so you said you wanted some fresh blood?" with the question: "I did?" The court reporter missed the

and *Price Waterhouse*, when cobbled together, created a relatively straightforward framework for proving discrimination cases. Cases with direct evidence, where discrimination played a substantial role, were labeled "mixed-motive." Cases with circumstantial or no evidence at all were analyzed under the so-called "pretext" model. This framework, however, did not last long.

In *St. Mary's Honor Center v. Hicks*,[79] the plaintiff alleged that he was terminated because of his race.[80] The employer, in contrast, argued that it terminated Hicks for poor work performance.[81] The District Court held that the articulated reason was not true and instead, the supervisors engaged in a crusade to terminate the plaintiff. Because, however, the plaintiff proved that the crusade was personally and not racially motivated, the District Court found for the employer.[82] On appeal, the Eighth Circuit reversed and held that when the proffered reasons are found to be untrue the employee has proven pretext and the plaintiff prevails as a matter of law.[83] The Supreme Court reversed and held that the plaintiff will prevail, as a matter of law, only if the employee proves pretext and provides evidence that the real reason was discrimination.[84]

Many commentators refer to this as "pretext plus."[85] Despite Justice Souter's assertions in his dissent, the case expressly stated that fact finders were free to infer discrimination from a finding of pretext, but they did not have to.[86] Still, reaction to *Hicks* from employee rights advocates was swift and strong. Employee advocates contended that by requiring evidence of discrimination, *Hicks* made prevailing in discrimination cases nearly impossible for employees.[87] While "impossible" may be too strong, *Hicks* did, in fact, alter employment discrimination's legal terrain.

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inflection and the transcript stated: "I did." The court allowed a mixed-motive instruction based on the deposition.

79. 509 U.S. 502 (1993).

80. *Id.* at 504–05.

81. *Id.*

82. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1252 (E.D. Mo. 1991).

83. Hicks v. St. Mary's Honor Ctr., Div. of Adult Insts. of the Dep't of Corr., 970 F.2d 487, 492 (8th Cir. 1992).

84. *Hicks*, 509 U.S. at 515–16.

85. *See id.* at 535–36 (Souter, J., dissenting).

86. *Id.* at 511.

87. *See, e.g.*, Employment Discrimination Evidentiary Amendment of 1993, H.R. 2787, 103d Cong. (1993) (proposing an amendment to Title VII that would override the majority holding in *Hicks*); Civil Rights Standards Restoration Act, S. 1776, 103d Cong. (1993) (proposing an amendment to the Revised Statutes § 1979 that would restore the pre-*Hicks* plaintiff's burden in intentional discrimination cases); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995); Sherie L. Coons, Comment, *Proving Disparate Treatment After* St. Mary's Honor Center v. Hicks*: Is Anything Left of*

However one may characterize the array of changes wrought by *Hicks*, one consequence, as feared by employee advocates, is an increase in the probability of false-negative outcomes. Specifically, employers who discriminate, but are savvy enough to avoid leaving the proverbial smoking gun, can discriminate without undue exposure to legal liability. On the other hand, however, the *Burdine* holding, where a finding of pretext results in an automatic victory for the employee, increases prospects for false-positive outcomes. Specifically, employers that did *not* discriminate were nonetheless unduly exposed to liability. Justice Scalia's majority opinion provides an illustrative hypothetical.[88]

Justice Scalia's hypothetical assumes that forty percent of an employer's workforce is drawn from a protected minority group that comprised only ten percent of the available workforce. An applicant from that particular minority group applies and is rejected by a decision maker who belongs to that same minority group. That decision maker is later terminated and is either unavailable or unwilling to help the employer when the applicant files

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McDonnell Douglas*?*, 19 J. CORP. L. 379, 408 (1994) ("The Hicks majority's holding is ill-conceived and furthers unsound policy because . . . [it] places an impossible burden of persuasion on plaintiffs . . . ."); Derrick L. Horner, Recent Development, *Toward Clarifying the Ambiguity of Merging Burdens*—St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993)*, 11 HARV. BLACKLETTER L.J. 205, 213 (1994) (concluding that *Hicks* confronts plaintiffs with an "impossible burden of having to disprove any reason for the employer's action a factfinder might see sketched in the record"); Shannon R. Joseph, Note, *Employment Discrimination: Shouldering the Burden of Proof After* St. Mary's Honor Center v. Hicks, 29 WAKE FOREST L. REV. 963, 988–89, 992–95 (1994) (contrasting civil rights attorneys' reactions to *Hicks* with that of management attorneys and evaluating proposed legislation attempting to overturn *Hicks*); Michael C. McPhillips, Note, St. Mary's Honor Center v. Hicks*: The Casual Abandonment of Title VII Precedent*, 23 CAP. U. L. REV. 1045, 1066 (1994) ("[T]he court's newly-developed burdens will make it impossible for many plaintiffs to get beyond summary judgment . . . [and] might chill their initiation of legitimate claims."); Louis M. Rappaport, Note, St. Mary's Honor Center v. Hicks*: Has the Supreme Court Turned its Back on Title VII by Rejecting "Pretext-Only?"*, 39 VILL. L. REV. 123 (1994); Ronald A. Schmidt, Note, *The Plaintiff's Burden in Title VII Disparate Treatment Cases: Discrimination Vel Non*—St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993)*, 73 NEB. L. REV. 953, 976–81 (1994) (summarizing criticism of *Hicks* but concluding that a *Hicks* plaintiff bears no greater burden than that of any other civil plaintiff); Note, *Title VII—Burden of Persuasion in Disparate Treatment Cases*, 107 HARV. L. REV. 342, 349 (1993) (arguing that requiring the plaintiff to show direct evidence of intent "will severely curtail the ability of many Title VII plaintiffs to succeed on their disparate treatment claims"); *EEOC Urges Congress to Overturn Supreme Court's 1993* Hicks *Decision*, 1993 DAILY LAB. REP. (BNA) No. 193, Oct. 7, 1993, at D-7 (quoting EEOC Chairman as saying of post-*Hicks* litigation, "it may be impossible to prove discrimination in the absence of direct evidence, which is so rarely available"); *Management, Civil Rights Attorneys Differ on Effect of* Hicks *Decision*, 1993 DAILY LAB. REP. (BNA) No. 126, July 2, 1993, at D-26 (quoting numerous employee groups characterizing the decision as a "[huge] blow to civil rights advocates" and calling for a legislative response).

88. *Hicks*, 509 U.S. at 513–14.

a discrimination charge. The employer attempts to find the "real" reason for the decision, but the plaintiff's lawyer successfully argues the reason to be untrue. The jury is therefore instructed it must find for the employee. In his opinion, Scalia argued that such a finding was untenable.[89] Title VII and the other discrimination statues are not, according to *Hicks*, the truth in employment acts, and the remedy for lying is perjury, not discrimination liability.[90] We believe that neither *Hicks* nor *Burdine* is perfect. *Hicks* fuels false-negative results and *Burdine* stimulates false-positive results. If eliminating discrimination is the goal, *Burdine* is the better approach, but it comes at a cost of increasing employers' exposure to liability.

After *Hicks*, plaintiffs needed evidence to automatically prevail. While plaintiffs could prevail if the fact finder inferred discrimination from a finding of pretext, counting on such an inference is a very risky proposition for a plaintiff lawyer. Professor Estreicher refers to cases without evidence as "orphan" cases; they simply cannot find a lawyer to take them.[91] As a consequence there were two types of cases: (1) plaintiffs with circumstantial evidence, who had to pursue pretext cases; and (2) plaintiffs with direct evidence, who could pursue mixed-motive cases. Because of the burden of proof shift in mixed-motive cases, however, it seemed plaintiffs should have preferred mixed-motive cases. Plaintiffs' preference for mixed-motive cases should have increased dramatically after the passage of the CRA of 1991.

The CRA of 1991 provided for jury trials in Title VII cases, codified the concept of and altered the burden of proof in disparate impact cases, added punitive and compensatory damages, and, most importantly for the purpose of this Article, partially overturned *Price Waterhouse*. Under the CRA of 1991: (1) the plaintiff can satisfy the first prong and thus, shift the burden of proof if the protected class was a motivating (as opposed to a substantial) factor in the employer decision and (2) the employer does not escape liability if it proves that it would have made the decision regardless of the protected class. Instead, plaintiffs receive a declaratory judgment, and may receive costs and attorney fees, if they can satisfy the first prong of the two-prong mixed-motive test. Employers who cannot satisfy the second prong are subject to back pay, reinstatement, punitive and compensatory damages, as well as cost and fees.

As with most statutes or amendments, the CRA of 1991 contained statutory gaps. The two gaps that affected the mixed-motive instruction and

89. *Id.*

90. *Id.* at 521.

91. *See* Robin Pogrebin & Edward Klaris, *The Rules of the Game*, L. SCH., Autumn 2006, at 25, 34.

the burden of proof can be presented in two questions: (1) do Justice O'Connor's substantial factor and direct evidence standards still apply? and (2) do the amendments apply to the ADEA, the ADA, and retaliation cases? It took the Supreme Court twelve years to answer the former[92] and seventeen years to partially answer the latter.[93] Plaintiffs cheered the first ruling[94] while employers exhaled a sigh of relief after the second.[95]

In *Costa*, the Court provided a simple answer to a simple question. The question was: does the CRA of 1991 require plaintiffs to provide direct evidence that discrimination was a substantial factor in the employer's decision to receive a mixed-motive instruction? The Court concluded no. Both the majority opinion and Justice O'Connor's concurrence state that the only conclusion to be drawn from Congress's replacement of the term substantial with motivating, and its failure to even mention direct evidence, is that any evidence that discrimination motivated the employer is enough to warrant a mixed-motive instruction.[96] Along with allowing the mixed-motive instruction to be applied to a significant number of cases, *Costa* destroyed the employment discrimination litigation framework. Now, pretext cases were limited to where there was no evidence. As stated above, however, because plaintiff lawyers should be reluctant to take these orphan cases, it seemed that all cases became mixed-motive cases.[97]

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92. Desert Palace, Inc., v. Costa, 539 U.S. 90 (2003) (holding that there was no need for direct evidence in order to obtain the mixed-motive instruction).

93. *Gross* deals with the ADEA only, but it seems logical that the Court should follow it in ADA cases.

94. *See* Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 79 (2003) ("[T]he quiet little revolution started in *Costa* will be one of the most significant advances for civil rights enforcement in the twenty-first century.").

95. *See* David G. Savage, *Age Bias Much Harder To Prove: The Supreme Court Shifts the Burden of Proof to the Worker Making the Claim. Businesses Cheer*, L.A. TIMES, June 19, 2009, at A1 (noting that "[b]usinesses applauded" the Court's decision in *Gross*); *see also* Leigh A. Van Ostrand, Note, *A Close Look at ADEA Mixed-Motives Claims and* Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399 (2009).

96. *See Costa*, 539 U.S. at 102.

97. *See* Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102–03 (2004); Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 861 (2004).

A. Are All Cases Mixed-Motive Cases?

After *Costa*, a number of scholars and court decisions proclaimed the death of *McDonnell Douglas*.[98] Reports of *McDonnell Douglas*'s death, however, were greatly exaggerated. In fact, in the six-month period between December of 2006 and May of 2007, courts used the *McDonnell Douglas* framework in over 400 cases.[99] Moreover, courts in *every* federal circuit used the *McDonnell Douglas* framework in 2008–2009.[100] Thus, the interesting question is not whether *McDonnell Douglas* did survive *Costa*—it did—but rather, should it have?

The relevance of *McDonnell Douglas* after *Costa* has been hotly debated in courts and numerous law review articles.[101] The debate is heated and complex because the schemes are not the result of any thoughtful coherent policy. Instead, they arise out of layered case law analyzing Title VII, the CRA of 1991, and the other discrimination statutes. There has never been

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98. For insight into the debate, see William R. Corbett, McDonnell Douglas, *1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 212–13 (2003) and Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887 (2004).

99. *See* Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law:* McDonnell Douglas*'s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 538 n.142 (2008).

100. Our very broad search terms consisted of: "*McDonnell Douglas* and Title VII or ADA or ADEA and discrimination." We then read cases from each circuit to confirm that all circuits used the pretext standard in the time period in question. According to this research, the only circuit which has not cited the *McDonnell Douglas* framework since *Costa* is the Federal Circuit. *See, e.g.*, EEOC v. Chevron Phillips Chem. Co., 570 F.3d 606, 615 (5th Cir. 2009) (the ADA); Reeves v. DSI Sec. Servs., 331 F. App'x 659, 662 (11th Cir. 2009) (Title VII); Hendricks v. Geithner, 568 F.3d 1008, 1012 (D.C. Cir. 2009) (Title VII); Flax v. Delaware, 329 F. App'x 360, 363–64 (3d Cir. 2009) (Title VII, the ADA, and the ADEA); Cunningham v. N.Y. State Dep't of Labor, 326 F. App'x 617, 618–19 (2d Cir. 2009) (Title VII); Nealey v. Water Dist. No. 1, 324 F. App'x 744, 748 (10th Cir. 2009) (the ADA and the ADEA); Gerving v. Opbiz, L.L.C., 324 F. App'x 692, 694–95 (9th Cir. 2009) (Title VII); Antonetti v. Abbott Labs., 563 F.3d 587, 591 (7th Cir. 2009) (Title VII); Sybrandt v. Home Depot, U.S.A., Inc., 560 F.3d 553, 557–58 (6th Cir. 2009) (Title VII); Johnson v. Mechs. & Farmers Bank, 309 F. App'x 675, 682 (4th Cir. 2009) (the ADEA); Qamhiya v. Iowa State Univ. of Sci. & Tech., 566 F.3d 733, 746 (8th Cir. 2008) (Title VII); Sabinson v. Trs. of Dartmouth Coll., 542 F.3d 1, 4 (1st Cir. 2008) (Title VII and the ADEA); Haddon v. Exec. Residence at the White House, 313 F.3d 1352, 1359 (Fed. Cir. 2002) (using the Title VII rationale to apply *McDonnell Douglas* to an analogous statutory discrimination claim; this is the most recent citation of *McDonnell Douglas* in the Federal Circuit).

101. To appreciate the current debate, see *Herawi v. Alabama Department of Forensic Sciences*, 311 F. Supp. 2d 1335, 1345 (M.D. Ala. 2004) (arguing the purported demise of *McDonnell Douglas* is overblown) and Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell Douglas *nor Transformed All Employment Discrimination Cases to Mixed-Motive*, 36 ST. MARY'S L.J. 395, 405 (2005) ("[N]othing in *Desert Palace* hints at the death or even wounding of *McDonnell Douglas*.").

Congressional action addressing the issue or a Supreme Court opinion deciding whether the two systems can still co-exist. Indeed, Congress in the CRA of 1991 and the Court in *Costa* declined to address the issue. The enduring circuit split regarding how courts operationalize *McDonnell Douglas* only fuels further confusion.

Prior to *Price Waterhouse*, all circuits used the *McDonnell Douglas* scheme in summary judgment motions.[102] A number of circuits, however, held that *McDonnell Douglas* is no longer relevant once the case gets to trial.[103] These circuits constructed, and often still use, jury instructions that do not address the prima facie case, the articulation of non-discriminatory reason, and the concept of pretext.[104] Instead, the jury instruction simply asks the jurors to decide if the employer made its decision "because of" the protected class.[105] In other jurisdictions, in contrast, jury instructions include the entire scheme.[106] Conversely, the mixed-motive scheme is a jury

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102. *See* Kristina N. Klein, Note, *Oasis or Mirage?* Desert Palace *and Its Impact on the Summary Judgment Landscape*, 33 FLA. ST. U. L. REV. 1177, 1186–87 (2006) (discussing *McDonnell Douglas* in the context of summary judgment).

103. *See* Sperino, *supra* note 5, at 376–78 (chronicling the case law of the circuits in great detail).

104. *See* Whittington v. Nordam Group Inc., 429 F.3d 986, 997–98 (10th Cir. 2005); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004); Sanders v. N.Y. City Human Res. Admin., 361 F.3d 749, 758 (2d Cir. 2004); Sanghvi v. City of Claremont, 328 F.3d 532, 539–40 (9th Cir. 2003); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999) ("We stress that it is unnecessary and inappropriate to instruct the jury on the *McDonnell Douglas* analysis."); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994); Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) (noting that the "shifting burdens of production of *Burdine* . . . are beyond the function and expertise of the jury" as well as "overly complex").

105. *See* Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 221–22 (3d Cir. 2000) (holding that it is improper to instruct the jury on the *McDonnell Douglas* burden shifting scheme, but proper "to instruct the jury that it may consider whether the factual predicates necessary to establish the prima facie case have been shown"); Walther v. Lone Star Gas Co., 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age.").

106. *See* Gafford v. Gen. Elec. Co., 997 F.2d 150, 167 & n.9 (6th Cir. 1993) (holding that it was proper to "guid[e] the jury through a three-stage order of proof as opposed to instructing . . . solely on the ultimate issue of sex discrimination"); *see also* Brown v. Packaging Corp. of Am., 338 F.3d 586, 595–96 (6th Cir. 2003); Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1425 & n.3 (10th Cir. 1993); Lynch v. Belden & Co., 882 F.2d 262, 269 (7th Cir. 1989) ("[I]t was proper for the district court to instruct the jury as to the *McDonnell Douglas/Burdine* formula for evaluating indirect evidence."); Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 200 (1st Cir. 1987) ("[T]he district court was correct in using the [*McDonnell Douglas*] framework in the instructions to the jury.").

instruction.[107] After *Costa*, however, some courts used the mixed-motive scheme in summary judgments while others refused to do so.[108] Thus, our analysis considers two discrete, though related, aspects: (1) summary judgment motions and (2) trials.

B. Summary Judgment Motions

The Sixth Circuit held that *McDonnell Douglas* does not apply to mixed-motive cases and thus, to survive summary judgment motions, plaintiffs need only prove that they suffered an adverse employment action and that membership in a protected class motivated the employers' action.[109] The Eighth and Eleventh Circuits concluded that *McDonnell Douglas* applies to the summary judgment analysis of mixed-motive claims after *Costa*.[110] The Fifth Circuit adopted what the *Baxter* court referred to as a "modified *McDonnell Douglas*" approach. Under this approach, plaintiffs in mixed-motive cases can rebut the defendant's legitimate non-discriminatory reason through evidence of pretext (the traditional *McDonnell Douglas*), and/or with evidence that the defendant's proffered reason is only one of the reasons for its conduct (the mixed-motive alternative).[111] The Second Circuit seemingly followed this analysis as well.[112]

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107. *See* Donovan v. Milk Mktg. Inc., 243 F.3d 584, 585–86 (2d Cir. 2001) ("[W]hen the jury might reasonably conclude on the evidence that both illegal discrimination and legitimate non-discriminatory reasons were present in an employer's decisionmaking process, the court may charge the jury on mixed-motivation in accordance with *Price Waterhouse*.").

108. *See generally* Kerry S. Acocella, Note, *Out with the Old and In with the New: The Second Circuit Shows It's Time for the Supreme Court to Finally Overrule* McDonnell Douglas, 11 CARDOZO WOMEN'S L.J. 125 (2004).

109. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008).

110. *See* Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) ("[W]e conclude that *Desert Palace* had *no* impact on prior Eighth Circuit summary judgment decisions."); *see also* Burstein v. Emtel, Inc., 137 F. App'x 205, 209 n.8 (11th Cir. 2005) (suggesting that the *McDonnell Douglas* analysis continues to apply in mixed-motive cases without modification post-*Desert Palace*); Cooper v. S. Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004) (rejecting an argument that "the *McDonnell Douglas* burden-shifting analysis . . . was radically revised by the Supreme Court in *Desert Palace*" and noting that "after *Desert Palace* was decided, this Court has continued to apply the *McDonnell Douglas* analysis in non-mixed-motive cases").

111. *See* Machinchick v. PB Power, Inc., 398 F.3d 345, 352 (5th Cir. 2005); Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

112. The Second Circuit appears to follow the "modified *McDonnell Douglas*" approach, though they do not state so explicitly. *See* Holcomb v. Iona Coll., 521 F.3d 130, 141–42 (2d Cir. 2008) ("[A] plaintiff who, like Holcomb, claims that the employer acted with mixed motives is not required to prove that the employer's stated reason was a pretext. A plaintiff alleging that an employment decision was motivated both by legitimate and illegitimate reasons may establish that the impermissible factor was a motivating factor, without proving that the employer's

In contrast, the Fourth, Ninth, and D.C. Circuits offer employee plaintiffs the choice to defend against a defendant's motion for summary judgment by proceeding under either the *McDonnell Douglas* scheme or by "presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated [at least in part] the . . . adverse employment decision."[113] The First, Third, and Tenth Circuits have addressed the issue, but have not established a coherent rule,[114] while the Seventh Circuit appears to have not yet considered this issue.[115]

C. Trials

As stated above, a split exists among the circuits as to whether the *McDonnell Douglas* burden-shifting scheme should be part of jury instructions. A majority of circuits do not include burden shifting in the instructions because *McDonnell Douglas* is viewed as too complex and confusing for the jury.[116] Instead, these circuits simply ask the jury if an

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proffered explanation was not some part of the employer's motivation.") (emphasis omitted) (internal quotations omitted).

113. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); *see* McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004) (finding that a mixed-motive plaintiff "may proceed using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the employment decision); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284–85 (4th Cir. 2004). The D.C. Circuit appears to have recently joined this middle ground approach. *See* Fogg v. Gonzales, 492 F.3d 447, 451 & n.* (D.C. Cir. 2007) (indicating that "a plaintiff can establish an unlawful employment practice by showing that 'discrimination or retaliation played a "motivating part" or was a "substantial factor" in the employment decision'" but noting that a "plaintiff may also, of course, use evidence of pretext and the *McDonnell Douglas* framework to prove a mixed-motive case").

114. *See* Houser v. Carpenter Tech. Corp., 216 F. App'x 263, 265 (3d Cir. 2007) (refusing to decide the issue because the plaintiff had failed to produce sufficient evidence to survive summary judgment under any mixed-motive standard); Furaus v. Citadel Commc'ns Corp., 168 F. App'x 257, 260 (10th Cir. 2006) (refusing to decide the issue because the plaintiff failed to properly preserve the argument for appeal); Rodriguez v. Sears Roebuck de P.R., Inc., 432 F.3d 379, 380–81 (1st Cir. 2005); Hillstrom v. Best W. TLC Hotel, 354 F.3d 27, 31 (1st Cir. 2003).

115. We could not find cases discussing this issue in the Seventh Circuit.

116. Whittington v. Nordam Group, Inc., 429 F.3d 986, 997–98 (10th Cir. 2005) (noting that the court has disapproved using *McDonnell Douglas* because the jury is not well equipped to understand the burden shifting); Sanghvi v. City of Claremont, 328 F.3d 532, 540 (9th Cir. 2003) ("[I]t is error to charge the jury with the elements of the *McDonnell Douglas* prima facie case."); Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 221 (3d Cir. 2000) (holding that, although it is proper "to instruct the jury that it may consider whether the factual predicates necessary to establish the prima facie case have been shown," it is error to instruct the jury on the *McDonnell Douglas* burden shifting scheme); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999) ("[I]t is unnecessary and inappropriate to instruct the jury on the

employer acted because of an employee's status as a member of a protected class. The First and Second Circuits take more of a middle ground approach by acknowledging that *McDonnell Douglas* is confusing but relevant to the jury.[117] The Sixth Circuit, however, holds that *McDonnell Douglas* is properly included in jury instructions.[118]

D. Where To Go From Here?

Whether *McDonnell Douglas* should survive *Costa* is beyond the scope of this Article. After all, numerous scholars have already addressed this question.[119] Also, and more importantly, courts, at least for now, have

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McDonnell Douglas analysis."); Ryther v. KARE 11, 108 F.3d 832, 849–50 (8th Cir. 1997) (en banc) (Loken, J., in Part II.A of the dissent, which a majority of the court joined) (holding that "the jury need only decide the ultimate issue of intentional age discrimination," and usually need not make findings on the prima facie case or whether the defendant's explanation is pretextual); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) ("Once the judge finds that the plaintiff has made the minimum necessary demonstration (the 'prima facie case') and that the defendant has produced an age-neutral explanation, the burden-shifting apparatus has served its purpose, and the only remaining question—the only question the jury need answer—is whether the plaintiff is a victim of intentional discrimination.") (emphasis omitted); Walther v. Lone Star Gas Co., 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age."); Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) (noting that the "shifting burdens of production of *Burdine* . . . are beyond the function and expertise of the jury" and are "overly complex").

117. Cabrera v. Jakabovitz, 24 F.3d 372, 381–82 (2d Cir. 1994) (holding that, although a jury instruction that included the phrase "prima facie case" and referred to "defendants' 'burden' of produc[tion] . . . created a distinct risk of confusing the jury," in certain instances it would be appropriate to instruct the jury on the elements of a prima facie case); Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979) ("*McDonnell Douglas* was not written as a prospective jury charge; to read its technical aspects to a jury, as was done here, will add little to the jury's understanding of the case . . . ."). *But see* Lynch v. Belden & Co., 882 F.2d 262, 269 (7th Cir. 1989) ("[I]t was proper for the district court to instruct the jury as to the *McDonnell Douglas/Burdine* formula for evaluating indirect evidence. . . . [Such an instruction] accurately informed the jury of the parties' burdens . . . .") (citation omitted); Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 200 (1st Cir. 1987) ("[T]he district court was correct in using the framework in the instructions to the jury" because "[i]t is a straightforward way of explaining how to consider whether there is intentional discrimination."), *abrogated on other grounds by* Iacobucci v. Boulter, 193 F.3d 14, 27 (1st Cir. 1999).

118. Gafford v. Gen. Elec. Co., 997 F.2d 150, 167 & n.9 (6th Cir. 1993) (holding that it was not error to "guid[e] the jury through a three-stage order of proof as opposed to instructing . . . solely on the ultimate issue of sex discrimination").

119. *E.g.*, Christopher R. Hedican et al., McDonnell Douglas*: Alive and Well*, 52 DRAKE L. REV. 383, 395–402, 425 (2004) (defending *McDonnell Douglas* as "a fair and appropriate way to ferret out discrimination"); Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 38–62 (2005) (arguing for the retention of the *McDonnell Douglas* framework as one possible method

spoken by continuing to apply *McDonnell Douglas*.[120] Thus, even if the mixed-motive instruction were available in all cases, it would not always be used. Finally, this Article seeks only to assess whether jury instructions do, in fact, matter. Although we leave the normative aspects of this question to others, two points warrant mention. First, we argue that regardless of the scheme used, it is simply naïve to separate cases into so-called single or mixed-motive cases. Second, *Gross* strikes us as incorrect—all discrimination statutes should follow the same scheme.

References to *Price Waterhouse* as a "mixed-motive" case imply that *McDonnell Douglas* cases are "single-motive" cases. This distinction makes little sense.[121] First, absent certain reprehensible behavior, such as workplace violence, it is illogical to think that sophisticated business decision makers hire, fire, promote, or demote people for any individual reason. Instead, human resource departments have multi-step procedures to make such decisions. It is increasingly hard to believe that in a multi-cultural society forty-five years after Title VII, numerous employers base a business decision *exclusively* on whether an employee simply belongs to a protected class. Where such a case arises, it would surely trigger quick litigation (and, likely, quick settlement). Moreover, that the majority of discrimination cases are discharge cases makes the single-motive argument even less persuasive. A terminated employee was initially hired by the company. Unless there was a change in decision-making personnel, this suggests that the employer was neither racist nor sexist at the point of hiring, but became so by the time a termination decision was implemented.

Are most employment discrimination cases mixed-motive cases? Probably. Employers typically rely on numerous factors in the employment context, many legitimate and, unfortunately, some unlawful.[122] There is another reason to argue against the bifurcated single-motive versus mixed-motive label. Currently, judges decide what type of case it is before the case

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for plaintiffs to present proof of disparate treatment); Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 110 (2007) ("I come to defend *McDonnell Douglas* . . . ."); Zimmer, *supra* note 98, at 1933 (arguing that *McDonnell Douglas* should continue to play a limited role in disparate treatment cases because its "process of elimination is a fundamentally sound way of persuading the factfinder that discrimination was involved in the [defendant's] decision").

120. *See supra* notes 99–100.

121. *See* Katz, *supra* note 119, at 150 n.142.

122. *See, e.g.*, Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 47 (2006) (finding that decision makers unconsciously rely on racial information in their decisions but mask its influence by inflating the value of non-racial justifications).

goes to the jury. We contend that whether the case is a single-motive case (assuming this is possible) or mixed-motive case is a question for the jury.

In typical discrimination cases, employees argue that they were terminated for unlawful reasons. Conversely, employers argue that legitimate business factors motivated their decisions. In such cases, at least three scenarios are possible. First, the employee is correct; unlawful reasons motivated the employer's decisions. Second, the employer is correct; legitimate business factors explain its actions. Third, legitimate *and* illegitimate factors motivated the employer.

We contend that determining which of the three scenarios best fits the facts is the job of the fact finder—not the judge. In fact, as the Fifth Circuit stated in *Smith v. Xerox*,[123] having the court "label" the case before trial is unnecessary.[124] The *Smith* court, citing *Costa*, stated that all plaintiffs should prefer the mixed-motive instruction and held that the court should allow this instruction if there is enough evidence to allow a fact finder to infer that the employer was motivated by both legitimate and illegitimate reasons.[125] The *Smith* court gave the mixed-motive instruction because the plaintiff presented evidence of discrimination and the employer presented evidenc of a legitimate reason for its decision.[126] While the *Smith* court's analysis makes sense, we contend it is almost always a waste of time. As a practical matter, cases simply do not reach the trial stage if the employee has nothing to support the claim and if the employer has not provided a legitimate reason for its decision. Thus, courts in such cases should provide a mixed-motive instruction.

Labeling a case as "mixed-motive," however, presupposes the holding of the jury. Accordingly, the jury instruction should be referred to as the motivating factor instruction (and for the remainder of this Article we will refer to it as such). Because it is the jury's role to determine whether the evidence presented by each side is credible, it is clear that all discrimination cases should follow the same rubric and all juries should be given the same type of instruction in order to decide the employers' motivations. Ideally, the law should then clearly state whether any unlawful motivation is permitted. Thus, Title VII should either prohibit all actions motivated by a protected class or it should prohibit all decisions made "because of the protected class." Some scholars and judges argue that providing the full *McDonnell Douglas* scheme is the proper instruction for determining

123. 602 F.3d 320 (5th Cir. 2010).
124. *Id.* at 333.
125. *Id.*
126. *Id.* at 333–34.

discrimination.[127] Others, in contrast, claim the motivating factor instruction is the best method.[128] Still others argue that the standard should be a simple "but for" or "because of" instruction.[129] For those who take such a position, either the *McDonnell Douglas* or the original *Price Waterhouse* scheme will suffice. While we could argue the merits of each, we could also agree with any of these scholars. The salient point, however, is that the *same* standard should apply in all employment cases. To this end, the Supreme Court took a large step backwards in *Gross*.

E. Gross *is Illogical*

In *Gross*, the Court held that the CRA of 1991 did not apply to the ADEA (and seemingly the ADA and retaliation).[130] The *Gross* holding is interesting for a number of reasons. First, it was a radical departure for the Court to hold that there were different standards of proof for the ADEA and Title VII. Second, it seems odd to hold that a statute that originally had more teeth than Title VII now has fewer. Finally, the Court's reasoning confuses more than persuades.

Prior to, and after, the CRA of 1991, courts routinely applied the same burden shifting analysis in ADEA and Title VII claims.[131] Moreover, the two statutes were typically treated similarly except when it came to damages. A line of cases dealing with pre-dispute mandatory arbitration

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127. *See* Davis, *supra* note 97, at 901.

128. Corbett, *supra* note 98, at 199–200; Davis, *supra* note 97, at 861; T.L. Nagy, *The Fall of the False Dichotomy: The Effect of* Desert Palace v. Costa *on Summary Judgment in Title VII Discrimination Cases*, 46 S. TEX. L. REV. 137, 156–57 (2004); Van Detta, *supra* note 94, at 76.

129. *See* Whittington v. Nordam Group, Inc., 429 F.3d 986, 996–97 (10th Cir. 2005); Sanghvi v. City of Claremont, 328 F.3d 532, 539–40 (9th Cir. 2003); Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 222 (3d Cir. 2000); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999); Ryther v. KARE 11, 108 F.3d 832, 845 (8th Cir. 1997) (en banc); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994); Walther v. Lone Star Gas Co., 952 F.2d 119, 125 (5th Cir. 1992); Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988).

130. *See Smith*, 602 F.3d at 329 (where the employee argued that *Gross* should be applied to retaliation cases); Bolmer v. Oliveira, 594 F.3d 134, 148–49 (2d Cir. 2010).

131. *See* Prenkert *supra* note 99, at 547–48 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). The *McDonnell Douglas* framework is often used to prove and to evaluate the evidence in cases claiming disparate treatment employment discrimination pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-1 to -17 (1994), as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621a–621b (1999), and the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101a–12101b (1995). *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) (analyzing an ADA claim using the *McDonnell Douglas* framework); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (assuming, but not holding, that the *McDonnell Douglas* framework applies in ADEA cases); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996) (same).

illustrates this. The first Supreme Court case dealing with this, *Alexander v. Gardner-Denver Co.*, a race case, held that a union arbitration agreement did not preclude an employee from litigating.[132] *Gilmer v. Interstate/Johnson Lane Corp.*, a non-union age case, distinguished *Alexander* because of the union/non-union difference, not age versus race.[133] The next four cases, all involving Circuit City as the employer, were Title VII cases.[134] All relied on *Gilmer* and none mentioned a statute-based distinction. Still, despite more than forty years of similar treatment, the *Gross* Court found that Title VII and the ADEA warranted different treatment.

In defense of the Court, Congress did not amend the ADEA in the CRA of 1991. Thus, Congress placed the Court in the awkward position of having to decide whether to: (1) apply a statute (the CRA of 1991) that does not address the ADEA; (2) apply a case, *Price Waterhouse*, that Congress amended because it was dissatisfied with the result; or (3) develop a third method for dealing with mixed-motive cases.

The Court pursued the third option and held that the burden-shifting framework set forth in *Price Waterhouse*, made more employee-friendly in the CRA of 1991, does *not* apply to the ADEA.[135] Thus, there is no such thing as a mixed-motive or motivating factor age discrimination case. The Court's analysis is difficult to follow. First, in the short period after *Price Waterhouse* and before the CRA of 1991, courts routinely applied the case to the ADEA.[136] After the CRA of 1991, courts were split as to whether plaintiffs were entitled to costs and fees when the jury found that age was a motivating factor, but the decision would have been made regardless of age.[137] After *Costa*, courts split on whether age plaintiffs still needed to provide direct evidence in order to obtain a mixed-motive instruction.[138] Indeed, that was the issue that the Court granted certiorari on in *Gross*.

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132. Alexander v. Gardner-Denver Co., 415 U.S. 36, 59–60 (1974).

133. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33–35 (1991).

134. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 110 (2001); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 675 (6th Cir. 2003); Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1200 (9th Cir. 2002); Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 682–83 (8th Cir. 2001).

135. *See* Gross v. FBL Fin. Servs. Inc., 129 S. Ct. 2343, 2351 (2009).

136. *See, e.g.*, Binder v. Long Island Lighting Co., 933 F.2d 187, 191–92 (2d Cir. 1991); Wilson v. Monarch Paper Co., 939 F.2d 1138, 1146 (5th Cir. 1991).

137. *See generally* Nancy L. Lane, *After* Price Waterhouse *and the Civil Rights Act of 1991: Providing Attorney's Fees to Plaintiffs in Mixed Motive Age Discrimination Cases*, 3 ELDER L.J. 341 (1995).

138. *Compare* Baqir v. Principi, 434 F.3d 733, 744–45 (4th Cir. 2006), *with* EEOC v. Warfield-Rohr Casket Co., 364 F.3d 160, 163 (4th Cir. 2004).

The splits made sense. Congress amended *Price Waterhouse* in the CRA of 1991 to make the mixed-motive more employee-friendly. As Judge Pooler noted, however, it would take a lot of "chutzpah" to apply the CRA of 1991 to an age case when Congress did not amend the statute.[139] In *Gross*, the Court turned away from years of applying the same scheme to all discrimination cases and ignored *Price Waterhouse*'s rationale. Instead, the Court cited two "pretext cases," *Reeves v. Sanderson Plumbing Products, Inc.*[140] and *O'Connor v. Consolidated Coin Caterers Corp.*,[141] for the propositions that: (1) in age cases the term discrimination means "because of" while in Title VII motivation it means unlawful, and (2) the burden of proof in age cases always remains with the plaintiff.[142] Thus, the *Gross* Court rejected the motivating factor standard (set forth in *Price Waterhouse*, as amended by the CRA of 1991) because, it held, the ADEA requires "but for" cause.[143]

The Court in *Gross* justified its holding by examining the following ADEA language: "*[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.*"[144] The Court, citing well established statutory construction guidelines, concluded that the plain language made it clear that the plaintiff bore the burden of proof at all times and that any burden shifting set forth in *Price Waterhouse* and in the CRA was inapposite to the ADEA's plain language.[145] As the dissent properly acknowledged, however, the ADEA's language is identical to that in Title VII, the basis of the motivating factor instruction.[146] The ADA has identical language as well.[147] Accordingly, the *Gross* Court distinguished the ADEA from Title VII by holding that identical language must, as a matter of law, have different judicial meanings.[148]

Regardless of our analysis, Justice Thomas's opinion in *Gross* holds that to prove an ADEA violation, a plaintiff must prove that age was the so-

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139. Judge Pooler made this statement to Professor Sherwyn during a jury instruction discussion when he argued that the CRA of 1991's mixed-motive language should apply in the ADEA case *Austin v. Cornell University*, 891 F. Supp. 740 (N.D.N.Y. 1995).

140. 530 U.S. 133 (2000).

141. 517 U.S. 308 (1996).

142. *See* Gross v. FBL Fin. Servs. Inc., 129 S. Ct. 2343, 2349 (2009).

143. *Id.* at 2351.

144. 29 U.S.C. § 623(a)(1) (2008) (emphasis added).

145. *See Gross*, 129 S. Ct. at 2349.

146. *Id.* at 2353–54.

147. 42 U.S.C. § 12112(a) (2008).

148. *See Gross*, 129 S. Ct. at 2349.

called "but-for" reason for the discrimination. In addition, *Gross* holds that the burden of proof remains with the plaintiff throughout the case. In contrast, Title VII plaintiffs need only prove that the protected class at issue was a motivating factor in order to obtain a declaratory judgment and earn costs and fees. Moreover, to avoid back pay, reinstatement, and punitive and compensatory damages, Title VII employers must prove that they would have made the decision regardless of the protected class. While reasonable minds can (and do) differ on whether *Gross* was correctly decided or reasoned, it is plain that the Court created different standards for Title VII cases and non-Title VII discrimination cases. The question we now turn to is whether such a distinction matters.

II. DOES THE BURDEN OF PROOF MATTER? EXPERIMENTAL EVIDENCE

Do employees fare better at trial with a mixed-motive instruction than with a pretext instruction? If so, one would expect that the granting of a mixed-motive instruction would lead to quicker and higher settlements. Is that the case?

Our inability to answer these questions with certainty flows from general methodological limits, as well as problems specific to jury instruction research. First, selection bias lurks as not all cases are reported,[149] and the sample of those cases that are reported is not random.[150] Second, most cases settle and most settlements are confidential.[151] Third, even if all employment discrimination lawsuits went to trial (and did not settle) and generated published opinions, factual and legal variations across cases complicate efforts to extract general rules to guide litigants. Fourth, specific issues investigated by this study confront additional hurdles. Summary judgment motions, by definition, do not address jury instructions because they are pre-trial motions. Appellate cases are only relevant if the jury instruction is the issue being examined (a small percentage of appeals).

149. *See* Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 246 (2001) ("The most important caveat that emerges from these [methodological] considerations is that appellate investigations in the employment discrimination area reflect a selection bias.").

150. For example, the U.S. Courts of Appeals publish opinions only selectively, and the circuits follow different rules regarding unpublished opinions. Colker, *supra* note 18, at 104–05 (noting the problems of statistical representation inherent in empirical analysis of appellate court decisions); *see also* Colker, *supra* note 149, at 244–45.

151. The few exceptions include settlement agreements for class actions, for claims filed by a governmental plaintiff, such as the EEOC, and, in some states, for claims against a governmental defendant regarding public records. *See* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869 (2007).

Finally, published results from jury trials are often not a helpful source of data as jury instructions are typically unavailable, making it difficult to know whether the case was a mixed-motive case or not.

A. Mock Jury Studies

We selected an experimental research design, specifically, a mock jury experiment, as the best option to address these important methodological challenges. Although mock jury studies are increasingly common in legal scholarship, the method warrants brief discussion. Mock jury studies seek to leverage the benefits of experimental research (such as manipulating key independent variables) and correlation research while minimizing some of the methodology's weaknesses.[152] In his review of mock jury research, Professor Saks identified a variety of issues where mock jury experiments were instrumental—juror characteristics, the effects of prejudicial pretrial news coverage, the use of impermissible information, jurors' ability to understand standards of proof and instructions on the law, and deliberation phenomena, to name a few.[153] Two experiments will be examined in brief detail to illustrate the process.

Mock jury experiments have aided researchers investigating the role of race in jury decision-making. A 2001 mock jury experiment examined the effect of racially-charged facts on white jurors' biases in a criminal battery case.[154] Researchers randomly distributed packets containing a trial summary, judicial instructions, and a questionnaire to white participants in an airport waiting area.[155] Half of the summaries involved a white defendant and half involved a black defendant.[156] Additionally, half contained racially-charged factual circumstances; in the other half, there was no racial tension.[157] On the questionnaire, subjects rendered a verdict, recommended a sentence, and rated the strength of the prosecution's and defendant's

152. *See generally* David De Cremer & Daan Van Knipperberg, *How Do Leaders Promote Cooperation? The Effects of Charisma and Procedural Fairness*, 87 J. APPLIED PSYCHOL. 858 (2002).

153. Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 9–44 (1997).

154. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 214–15 (2001).

155. *Id.* at 216.

156. *Id.*

157. In the racially-charged version, the defendant was one of only two of his race on a basketball team and had suffered racial remarks and unfair criticism by teammates. The race-neutral version did not mention racial tension. However, all summaries identified the defendant's race in a demographic information section. *Id.*

cases.[158] Statistical analyses showed that in race-neutral cases, white jurors more readily display anti-black bias than in racially-charged cases.[159] The authors hypothesized that the presence of race issues prompts jurors to conceal prejudice.[160]

Researchers have frequently turned to mock jury experiments to investigate jurors' ability to disregard inadmissible evidence. A seminal mock jury study, part of the University of Chicago jury project, examined damage awards for a fictional auto-accident case.[161] Participants in three groups listened to tape-recorded mock trials.[162] In the first group's recording, the defendant revealed he had no insurance, to no objection; in the second, the defendant revealed he had insurance, to no objection; and in the third, the defendant revealed he had insurance, counsel objected, and the court directed the jury to disregard.[163] The average awards were $33,000, $37,000, and $46,000 for the three groups, respectively.[164] The study concluded that the "fuss" over the defendant's coverage sensitized jurors to that fact and resulted in higher damage awards.[165]

Mock jury experiments provide a significant advantage over post-trial jury interviews and trial outcome quantitative analyses. Notably, the ability to change one variable at a time allows researchers to gain a clearer understanding of relations among key variables.[166] Nonetheless, the approach is not without limitations. Standard problems include that: (1) mock jurors are often students rather than a more representative population sample; (2) facts are presented in writing or by video or audio recording rather than through live trial; (3) verdicts lack real-world consequences, and most often; (4) group deliberation is absent.[167]

The degree of threat posed by student mock jurors is unclear. For example, studies examining the use of students have found "little or no difference in . . . verdicts by student and adult jury-eligible respondents for

158. *Id.* at 217.

159. *Id.* at 220.

160. *Id.*

161. *See* Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 753 (1959).

162. *Id.* at 753–54.

163. *Id.*

164. *Id.* at 754.

165. *Id.*

166. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1002 (2003).

167. *See* Saks, *supra* note 153, at 7.

the same cases."[168] A meta-analysis of twenty years of jury simulations found no conclusive difference between student and non-student participants.[169] Where the infrequent differences arose, students presented a slight preference against criminal conviction and for defendant civil liability.[170]

Although the absence of real-world consequences in mock jury experiments certainly limits external validity, results from studies of how actual and mock jury study findings differ are mixed.[171] For example, of the five studies indicated in Bornstein and McCabe, one study found the absence of real-life consequences increased conviction rates, another study found the opposite effect, and the remaining three found no main effect at all.[172] Regardless, difficulties associated with studying—let alone manipulating—jury behavior make access to such data not readily feasible.

The absence of group deliberations poses an important threat, however. Field work examined by a 2001 meta-analysis suggests that in one of every ten trials, a jury majority will change post-deliberation.[173] Deliberation comes at a cost, however: it requires more time and reduces sample size to one verdict for every six, eight, or twelve subjects, resulting in greater expense per data point. Altogether, mock jury experiments are a "necessary first step in designing more expensive and elaborate studies that examine deliberation."[174]

B. Jury Instructions

In an effort to enhance external validity in our experiment, we used case statements constructed (and used) by experienced employment discrimination specialists at a leading New York City law firm.[175] Before

168. Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 244 SCI. 1046, 1046 (1989).

169. Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75, 79–80 (1999).

170. *Id.* at 80.

171. *See* Brian H. Bornstein & Sean G. McCabe, *Jurors of the Absurd? The Role of Consequentiality in Jury Simulation Research*, 32 FLA. ST. U. L. REV. 443, 452 (2005).

172. *Id.*

173. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 701 (2001).

174. *See* Sommers & Ellsworth, *supra* note 154, at 224.

175. Founded in 1875, Proskauer, Rose LLP is a full service law firm with offices in New York, New Jersey, Florida, Los Angeles, Boston, Chicago, New Orleans, Washington D.C., and throughout the world. Proskauer: About Us, http://www.proskauer.com/about/ (last visited Sept. 9, 2010).

describing our experimental design, however, we first describe the jury instructions and special verdict sheets used in our study.

One problem with studying jury instructions is that judges may fashion their own specific jury instructions, as long as they accord with settled law. To that end, judges will ask each party to draft proposed jury instructions and will either choose one of the two proposals or draft a third to use. Conversely, some jurisdictions have established model jury instructions that are used in the vast majority of cases.[176] These instructions are accompanied by what are referred to as "special jury verdict sheets." At the time we started our study, the summer of 2004, the Northern District of Illinois had made sample discrimination jury instructions and special verdict sheets publicly available. These jury instructions and special verdict sheets, which we used in our study, are presented in the Appendix.[177]

To the untrained ear, the difference between the two instructions may seem minimal. If *Price Waterhouse* were the only standard, any difference would be largely meaningless. The jury could find that the protected class motivated the employer, but that the employer would have made the same decision regardless of the protected class. Before the CRA of 1991, such a holding would have represented a complete victory for the employer. The CRA of 1991, however, changed the legal terrain in a crucial way. After 1991, the employee wins costs and attorney fees with such a holding. Thus, jurors who believe that race, color, sex, national origin, religion, age, and disability always motivate decisions, but also believe that the employer would have made the same decision regardless of the protected class, may unwittingly award the plaintiff costs and fees *even if* they believe the case is frivolous and not worthy of any award. Most lay jurors (including the

176. *See, e.g.*, Lopez v. Mendez, 432 F.3d 829, 835 (8th Cir. 2005) (finding no error in the trial court's determination that an applicable Arkansas Model Jury Instruction stated Arkansas law correctly); Gatlin v. Cooper Tire & Rubber Co., 481 S.W.2d 338, 340–41 (Ark. 1972) (finding error where the trial court substituted its own instruction for an applicable Arkansas Model Jury Instruction without stating the basis for refusal); Irwin v. Omar Bakeries, Inc., 198 N.E.2d 700, 704–05 (Ill. App. Ct. 1964) (finding no error where the trial court did not use a specific Illinois Pattern Jury Instruction that the court determined was inapplicable); Means v. Sears, Roebuck & Co., 550 S.W.2d 780, 786 (Mo. 1977) (finding no error where the trial court modified the Missouri Approved Jury Instruction to apply it to the case facts); Anderson v. Welsh, 527 P.2d 1079, 1086–87 (N.M. Ct. App. 1974) (finding non-prejudicial error where the trial court gave not only the applicable Uniform Jury Instruction but additional inapplicable Uniform Jury Instructions).

177. FED. CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR., § 3.01 & cmt. c (Comm. on Pattern Civ. Jury Instructions of the Seventh Cir., Draft, Oct. 2004), *available at* http://www.ca7.uscourts.gov/Rules/pjury_civil_draft.pdf.

college students in our study) have no reason to understand or even be aware of this difference,[178] and this infuriates many management lawyers.

Management litigators have long complained that jurors might be inclined to "split the baby" and hold that the protected class did motivate the employer, but that the employer would have made the same decision regardless of the protected class status.[179] As stated above, such jurors would likely have no idea that they had just awarded costs and fees to the plaintiff. Even more troubling to management attorneys is that in many employment discrimination cases, costs and fees associated with defending employment discrimination cases can easily exceed the back pay damages that a prevailing employee would receive.[180]

Experienced and nuanced management litigators seek to reduce this problem by deleting the second prong of the mixed-motive instruction. Asking an employer to prove that it would have made its decision regardless of the protected class is relevant only if the jury finds that the protected class motivated the employer. A jury finding that improper motivation existed when it had another chance to find for the employer (i.e., the second prong) may otherwise not find motivation if that were the only question asked and if the finding of "yes" equaled damages. Because the second prong involves an employer's affirmative defense, however, an employer can choose whether to present it.

C. The Experiment

In our experiment, experienced litigators were videotaped delivering case statements regarding a situation where a plaintiff alleged he was not promoted because of his national origin. We then taped another litigator delivering three different jury instruction scenarios: (1) the pretext scenario; (2) the motivating factor scenario with the employer's affirmative defense; and (3) the motivating factor scenario *without* the employer's affirmative defense. Cornell University undergraduate students (N = 551) served as

178. Neither the instructions on law nor the special verdict sheets notify the jury that finding for the plaintiff with respect to the first prong grants costs and attorney fees even if the jury finds for the defendant with respect to the second.

179. For example, Joe Baumgarten, Proskauer, Rose, Gregg Gilman, Davis & Gilbert, Carolyn Richmond, Fox, Rothschild, and Paul Wagner, Stokes Roberts and Wagner each made this argument at the Cornell School of Hotel Administration's annual Labor and Employment Roundtable in 2006.

180. See sources cited *supra* note 17 and accompanying text for a brief discussion of "fees cases."

mock jurors.[181] On each of four separate days, over a two year period, groups of students ranging in size from fifty to 130 watched the videotaped presentation of the case statements. Immediately after watching the video presentation of the case statements, each student was randomly assigned to one of three rooms where different jury instruction scenarios were presented. Students listened to the jury instructions and then completed their own special jury verdict sheet.[182]

The experimental manipulation involved the jury instruction. Three randomly-assigned student groups heard one of three jury instruction scenarios: (1) pretext (P) (N=133); (2) motivating factor (MF) (N=142); and (3) motivating factor without the affirmative defense (MFWO) (N=138). Students assigned to the MFWO and the P groups knew that they were awarding all or nothing ($50,000) based on their answer to one question.

Students assigned to the motivating factor group, in contrast, confronted a two-part verdict question. Motivating factor jurors that concluded that the employee did not meet his legal burden answered only the first question. Motivating factor jurors that concluded that the employee did, in fact, meet his legal burden proceeded to the second question involving the employer's affirmative defense. Motivating factor jurors that concluded that the employee had met its legal burden and that the employer failed to prove its affirmative defense understood that they were awarding the employee $50,000. Motivating factor jurors did *not* know, however, that they were awarding costs and fees if they concluded that: (1) the employee met its legal burden and (2) the employer likewise proved its affirmative defense. In other words, those jurors assumed (albeit incorrectly) that by finding that the employee and employer met their respective burdens that the end result would be no recovery for the plaintiff. Motivating factor jurors had no idea that such an outcome resulted in employees receiving costs and fees.

Our experiment sought to assess whether different jury instructions would produce different results. That the three jury instructions do not include the identical number of questions somewhat complicates our results. The pretext and the motivating factor without the affirmative defense instructions have one question each. The full motivating factor instruction, in contrast, includes two questions. Moreover, the pretext and the motivating factor instruction without the affirmative defense instructions can generate only two possible results: (1) Yes, the plaintiff met its

181. Most of the participating students were attending Cornell's School of Hotel Administration.

182. To minimize underreporting and esteem-based influences, the experiment was conducted in a large auditorium and in classrooms; special jury verdict sheets were completed anonymously.

burden[183] and thus, is entitled to $50,000 in damages plus costs and fees or (2) no, the plaintiff failed to meet its burden and is therefore awarded nothing.

In contrast, the full motivating factor instruction generates three possible results. (1) Yes, the plaintiff proved that national origin was a motivating factor, and no, the employer did not prove that it would have made the decision regardless of national origin. This "Yes-No" outcome provides the plaintiff with $50,000 in damages plus costs and fees. (2) Yes, the plaintiff proved that national origin was a motivating factor, and yes, the employer would have made the decision regardless of national origin. The "Yes-Yes" outcome provides the plaintiff with cost and fees but no damages. (3) No, the plaintiff failed to prove that national origin was a motivating factor. A no answer to the first question results in a complete victory for the employer. Because the "Yes-No" and "Yes-Yes" results (outcomes 1 and 2, above) provide different awards, we separated responses to the pretext and the motivating factor without the affirmative defense instructions. We also compared the results of the single question instructions to each other. In all, the three separate jury instructions, some with multiple questions, generate five separate comparisons of interest.

D. Results

Overall, our results illustrate how jury instruction variations in the employment discrimination context can inform case outcomes. Statistically significant differences emerge in four of our five comparisons.

Although our findings emphasize how jury instruction differences can influence case outcomes, in one pairing—comparing pretext and full motivating factor jury instructions—no statistical difference emerged. As Table 1 illustrates, in nine of the full motivating factor cases (6%), jurors found for the plaintiff on both questions (i.e., "Yes-No") and thus, awarded damages along with costs and fees. The jurors found for the plaintiff in seventeen of the pretext cases (12%). This suggests that the burden of proof with regard to damages (i.e., back pay, reinstatement, punitive and compensatory) is irrelevant and lawyers and clients should not waste valuable time arguing over related jury instructions.[184]

183. The plaintiff carried his burden in the pretext case by proving he was not promoted because of his national origin. He met his burden in the national origin case by proving that national origin was a motivating factor in the decision not to promote him.

184. P=0.098 (Fisher's exact, two-tailed).

Table 1: Motivating Factor with the Affirmative Defense vs. Pretext: Complete Plaintiff Victory vs. Complete Plaintiff Victory

	Motivating Factor (w/ Affirm. Def.)	*Pretext*
No, plaintiff not awarded damages	133	116
Yes, plaintiff awarded damages	9	17
N	142	133

One practical consequence flowing from the CRA of 1991 is that damages are no longer the only relevant issue in many employment discrimination cases. Now, costs and fees often arise as a separate issue. Prior to the CRA of 1991, juror conclusions that "Yes, national origin motivated the employer, but yes, the employer would have not promoted the employee regardless of national origin," resulted in a complete victory for the employer. After the CRA of 1991, however, the identical juror conclusion would result in plaintiffs receiving attorney fees and litigation costs.[185] Notably, while jury instruction variations might not influence general damage awards (Table 1), our results suggest that such jury instruction variations do influence costs and fees awards. A focus on liability alone risks ignoring associated fees and costs which are frequently a critical element in many contested employment discrimination cases.

While only 9 of 142 motivating factor jurors found the company liable, 57 (40%) found that national origin motivated the employer. Of these fifty-seven jurors, however, forty-eight concluded that the company would have reached the same decision *regardless* of national origin. As a result, these forty-eight jurors, likely unwittingly, awarded costs and fees to the employee. As Table 2 illustrates, the number of motivating factor jurors (fifty-seven) who found that national origin did motivate the employer significantly differed from the number of pretext jurors (seventeen) who found that the employer was liable.[186] These findings suggest that while a motivating factor instruction may not influence liability, it significantly increases a litigating employee's prospects for receiving costs and fees.

185. According to plaintiffs' attorney Lee Bantle, Bantle & Levy LLP, costs are often at least $25,000. Fees can exceed $500,000.

186. P=0.001 (Fisher's exact, two-tailed).

Table 2: Motivating Factor with the Affirmative Defense vs. Pretext: Costs and Fees vs. Complete Plaintiff Victory

	Motivating Factor (w/ Affirm. Def.)	*Pretext*
No: No recovery for plaintiff	85	116
Yes: Costs & fees in column 1 v. full recovery in column 2	57	17
N	142	133

We also compared the pretext instruction[187] with the motivating factor without the affirmative defense instruction.[188] Both instructions involve a single question and result in an all or nothing award to the plaintiff. In other words, if a juror concluded that the employer was liable, the employee would receive $50,000 in addition to costs and fees. If a juror concluded that the employer was not liable, the employee received nothing. As Table 3 illustrates, seventeen of the jurors (12%) found for the plaintiff in the pretext cases and thirty-two of the jurors (23%) found for the plaintiff in the motivating factor without the affirmative defense cases. The differences in Table 3 achieve statistical significance and suggest that employers fare better with the pretext instruction than with the motivating factor without affirmative defense instruction.[189]

Table 3: Motivating Factor without the Affirmative Defense vs. Pretext: Full Recovery vs. Full Recovery

	Motivating Factor (w/o Affirm. Def.)	*Pretext*
No, plaintiff not awarded damages	106	116
Yes, plaintiff awarded damages	32	17
N	138	133

187. Did plaintiff Estefan Ruiz establish by a preponderance of the evidence that defendant discriminated against him in violation of Title VII of the Civil Rights Act of 1964 on the basis of his national origin with respect to the decision not to offer him a promotion in December 2003?

188. Did plaintiff Estefan Ruiz establish by a preponderance of the evidence that his national origin was a motivating factor in the decision by defendant, Rochester Chronicle, Inc., not to offer him a promotion in December 2003?

189. P=0.028 (Fisher's exact).

To isolate possible differences solely attributable to the presence of an affirmative defense in the jury instruction, we compared motivating factor cases that included the affirmative defense with motivating factor cases that excluded the affirmative defense. As Table 4 illustrates, with respect to liability, while thirty-two jurors (23%) found the employer liable in motivating factor cases that lacked an affirmative defense jury instruction, only nine jurors (6%) found for the plaintiff when the jury instruction included an employer affirmative defense. The differences in Table 4 are highly significant.[190]

Table 4: Motivating Factor with the Affirmative Defense vs. Motivating Factor without the Affirmative Defense: Full Recovery vs. Full Recovery

	Motivating Factor (w/ Affirm. Def.)	*Motivating Factor (w/o Affirm. Def.)*
No, plaintiff not awarded damages	133	106
Yes, plaintiff awarded damages	9	32
N	142	138

We also assessed how jurors answered Question 1 in motivating factor with (and without) an affirmative defense jury instructions.[191] As it relates to the first question about whether the plaintiff established a motivating factor, jurors with the affirmative defense answered "Yes" in fifty-seven (40%) instances and jurors with an instruction that excluded an employer affirmative defense answered "Yes" in thirty-two (23%) instances (Table 5). Differences in how the jurors answered the first question achieve statistical significance.[192]

190. P=0.001 (Fisher's exact).

191. Again, Question 1 is identical for both instructions. What distinguishes the two jury instructions is that the motivating factor jury with the affirmative defense instruction includes a second question.

192. P=0.003 (Fisher's exact).

Table 5: Motivating Factor with the Affirmative Defense (Q.1) vs. Motivating Factor without the Affirmative Defense (Q.1): Costs and Fees vs. Full Recovery

	Mixed-Motive	*Mixed-Motive (w/o Affirm. Def.)*
No, plaintiff not awarded damages	85	106
Yes, plaintiff awarded damages	57	32
N	142	138

III. DISCUSSION

The question we sought to answer is whether jury instructions matter. Based on results from our structured scenario jury instruction experiment, it seems that they do. Assuming facts that could go either way, employers have a substantially equal chance of prevailing in pretext and motivating factor cases, but there is a non-trivial chance that a motivating factor instruction will result in costs and fees being awarded. Employers, therefore, are better off with a pretext instruction than a motivating factor instruction.

If a judge orders a motivating factor instruction, however, the employer confronts a difficult choice involving whether to include an employer's affirmative defense in the jury instruction. To be sure, the full motivating factor jury instruction will more likely yield a complete victory than the MFWO for the employer. This does not mean, however, that the MFWO instruction should not be considered. An employer who chooses the MFWO reduces its exposure to costs and fees awards compared to employers who choose the full motivating factor jury instruction (remember there is no "splitting of the baby" in the MFWO). The question that arises is whether the employer should pursue including the second question (an employer's affirmative defense) if the judge orders a motivating factor instruction.

Results from our study suggest that the answer depends on the case. If the case is a "fees case" (low liability, but high attorney's fees),[193] the employer should go with the MFWO. If the employer's prospect for expensive liability is high (i.e., the potential damages are substantial), however, the employer should pursue the full motivating factor jury instruction. Both of these options, however, are less desirable than the

193. *See* sources cited *supra* note 17 and accompanying text.

pretext jury instruction for employers. Results from our study suggesting that the burden of proof influences employment discrimination litigation outcomes, only increases the stakes for employers as they asses their options.

The fact that differing burdens of proof produce different results does not, by definition, mean there is a problem. If there was a legitimate rationale for the different burdens, the altered result would not only be acceptable, it would be desired. Regrettably, this is not the case. As noted above, after *Costa* and prior to *Gross*, there was no clear standard as to when courts would apply the motivating factor instruction and not the pretext instruction. After *Gross*, the problem remains in Title VII cases, while a new problem arises in ADEA, ADA, and retaliation cases. Not only does the motivating factor not apply, litigants are now arguing that *McDonnell Douglas* does not apply either. In fact, in the short time period between *Gross* and the writing of this article, there have been numerous cases where parties argued that *McDonnell Douglas* did not apply.[194] In each case, however, district courts rejected these arguments and applied *McDonnell Douglas*. Thus, the burden of proof can be generally distilled as follows: *McDonnell Douglas* is the standard in all ADEA, ADA, and some retaliation cases. In Title VII cases, courts, with no real guidance or standards, can choose whether to apply the *McDonnell Douglas* or motivating factor standard.

To solve this problem, Congress has proposed a bill, the Protecting Older Workers Against Discrimination Act, House Bill 3721 (H.B. 3721),[195] to

194. *See, e.g.*, Smith v. City of Allentown, 589 F.3d 684, 690–91 (3d Cir. 2009) (distinguishing the shifting burdens in *Price Waterhouse* from those in McDonnell *Douglas* to apply the latter's framework to plaintiff's ADEA claim); Frankel v. Peake, No. 07-3539, 2009 WL 3417448, at *4 (D.N.J. Oct. 20, 2009) (holding the *McDonnell Douglas* framework applicable to ADEA claims opposed on summary judgment); Ferruggia v. Sharp Elecs. Corp., No. 05-5992, 2009 WL 2634925, at **2–4, (D.N.J. Aug. 25, 2009) (rejecting defendant's contention that the *Gross* holding barred application of the Title VII burden-shifting framework to all ADEA cases, rather than just mixed-motive cases); Holowecki v. Fed. Express Corp., 644 F. Supp. 2d 338, 352 (S.D.N.Y. 2009) (declining to decide whether the *McDonnell Douglas* framework still applies to circumstantial ADEA claims—noting that *Gross* left the issue open—because plaintiffs did not present even a colorable claim of discrimination).

195. Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009). Full text:

> **Section 1. Short Title.**
>
> This Act may be cited as the "Protecting Older Workers Against Discrimination Act".
>
> **Sec. 2. Findings and Purpose.**
>
> (a) Findings.—Congress finds the following:

(1) In enacting the Age Discrimination in Employment Act of 1967, Congress intended to eliminate discrimination against individuals in the workplace based on age.

(2) In passing the Civil Rights Act of 1991, Congress correctly recognized that unlawful discrimination is often difficult to detect and prove because discriminators do not usually admit their discrimination and often try to conceal their true motives.

(3) Congress has relied on a long line of court cases holding that language in the Age Discrimination in Employment Act of 1967, and similar antidiscrimination and antiretaliation laws, that is nearly identical to language in title VII of the Civil Rights Act of 1964 would be interpreted consistently with judicial interpretations of title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991. The Supreme Court's decision in Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009), has eroded this long-held understanding of consistent interpretation and circumvented well-established precedents.

(4) The holding of the Supreme Court in Gross, by requiring proof that age was the "but for" cause of employment discrimination, has narrowed the scope of protection intended to be afforded by the Age Discrimination in Employment Act of 1967, thus eliminating protection for many individuals whom Congress intended to protect.

(5) The Supreme Court's holding in Gross, relying on misconceptions about the Age Discrimination in Employment Act of 1967 articulated in prior decisions of the Court, has significantly narrowed the broad scope of the protections of the Age Discrimination in Employment Act of 1967.

(6) Unless Congress takes action, victims of age discrimination will find it unduly difficult to prove their claims and victims of other types of discrimination may find their rights and remedies uncertain and unpredictable.

(b) Purpose.—The purpose of this Act is to ensure that the standard for proving unlawful disparate treatment under the Age Discrimination in Employment Act of 1967 and other anti-discrimination and anti-retaliation laws is no different than the standard for making such a proof under title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991.

Sec. 3. Standard of Proof.

Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding after subsection (f) the following:

"(g)(1) For any claim brought under this Act or any other authority described in paragraph (5), a plaintiff establishes an unlawful employment practice if the plaintiff demonstrates by a preponderance of the evidence that—

"(A) an impermissible factor under that Act or authority was a motivating factor for the practice complained of, even if other factors also motivated that practice; or

"(B) the practice complained of would not have occurred in the absence of an impermissible factor.

"(2) On a claim in which a plaintiff demonstrates a violation under paragraph (1)(A) and a defendant demonstrates that the defendant would have taken the same action in the absence of the impermissible motivating factor, the court—

overturn *Gross* and hopefully solve the burden of proof problems associated with discrimination law. While H.B. 3721 would overturn *Gross*, it would not solve all the problems that need to be addressed.

In fact, current law includes four problems: (1) a curious distinction between Title VII and the ADEA, the ADA, and retaliation claims; (2) the lack of a clear standard in Title VII cases for deciding whether to follow the *McDonnell Douglas* or motivating factor protocol; (3) jurors who think they have awarded no damages unknowingly award costs and fees; and (4) the definition of guilt may be overbroad. H.B. 3721 solves problem one, may solve problem two, but does not solve problems three or four.

"(A) may grant declaratory relief, injunctive relief (except as provided in subparagraph (B)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under paragraph (1); and

"(B) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.

"(3) In making the demonstration required by paragraph (1), a plaintiff may rely on any type or form of admissible circumstantial or direct evidence and need only produce evidence sufficient for a reasonable trier of fact to conclude that a violation described in subparagraph (A) or (B) of paragraph (1) occurred.

"(4) Every method for proving either such violation, including the evidentiary framework set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), shall be available to the plaintiff.

"(5) This subsection shall apply to any claim that the practice complained of was motivated by a reason that is impermissible, with regard to that practice, under—

"(A) this Act, including subsection (d);

"(B) any Federal law forbidding employment discrimination;

"(C) any law forbidding discrimination of the type described in subsection (d) or forbidding other retaliation against an individual for engaging in, or interference with, any federally protected activity including the exercise of any right established by Federal law (including a whistleblower law); or

"(D) any provision of the Constitution that protects against discrimination or retaliation.

"(6) This subsection shall not apply to a claim under a law described in paragraph (5)(C) to the extent such law has an express provision regarding the legal burdens of proof applicable to that claim.

"(7) In any proceeding, with respect to a claim described in paragraph (5), the plaintiff need not plead the existence of this subsection.

"(8) In this subsection, the term 'demonstrates' means meet the burdens of production and persuasion.".

Sec. 4. Application.

This Act, and the amendments made by this Act, shall apply to all claims described in section 4(g)(4) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(g)(4)) pending on or after June 17, 2009.

Id.

H.B. 3721, as proposed, certainly addresses the first problem by allowing the motivating factor standard of proof to be used in ADEA cases and, according to proposed Sections 4(g)(5)(b), (c), and (d), in all other cases filed under any federal employment discrimination statute or the United States Constitution.

Moreover, H.B. 3721 may also solve problem two. Section 4(g)(4) reads: "Every method for proving either such violation, including the evidentiary framework set forth in *McDonnell-Douglas Corp. v. Green*,[196] 411 U.S. 792 (1973), shall be available to the plaintiff."[197] On its face, this seems to stand for the proposition that it is now up to the plaintiffs in ADEA cases and all other cases to choose whether to follow the *McDonnell Douglas* or the mixed-motive standard. Such a standard would eliminate the current amorphous state of affairs where jurisdictions or judges determine the burden of proof with no true guidelines. Sadly, we cannot confidently state that H.B. 3721, as currently written, will, in fact, solve this problem. Section 2(b) reads:

> The purpose of this Act is to ensure that the standard for proving unlawful disparate treatment under the Age Discrimination in Employment Act of 1967 and other anti-discrimination and anti-retaliation laws is no different than the standard for making such a proof under title VII of the Civil Rights Act of 1964, including amendments made by the Civil Rights Act of 1991.[198]

Neither Title VII nor the CRA of 1991 allows plaintiffs to choose the framework under which their case is to be decided. Instead, courts choose. Accordingly, either: (1) Section 2(b) should not be read as limiting the new law and thus, H.B. 3721 amended Title VII to allow plaintiffs to choose which burden of proof framework they would like to use; or (2) proposed Section 4(g)(4) is not as broad as it appears and it really means that the motivating factor framework is now available in all discrimination cases, but the choice remains with the court; or (3) Title VII is not affected by H.B. 3721, and thus now the motivating factor instruction is available to all ADEA (and seemingly ADA and retaliation) plaintiffs who choose it, but subject to the discretion of the court in Title VII cases.

While it seems problematic, this issue is easily finessed. To be consistent with the language of the statute and with the reality of how employment discrimination decisions are made, it follows that plaintiffs should have

196. 411 U.S. 792, 802 (1973).
197. H.R. 3721 sec. 3, § 4(g)(4).
198. H.R. 3721 sec. 2(b).

their choice as to which framework under which to proceed. H.B. 3721 could be clarified, hundreds of appeals could be avoided, and thousands of law review pages could be rendered moot as the problem would be solved. Indeed, as discussed above, after *Costa*, there is simply no justifiable reason for distinguishing between the two types of cases. Put simply, plaintiffs should be able to choose their framework.

Solving the first two problems does not, however, solve problems three or four. It is helpful to examine problem four first. *Price Waterhouse* held that the burden of proof shifted to the employer if the employee proved, with direct evidence, that discrimination was a "substantial factor" in the employer's decision.[199] The CRA of 1991 and the Protecting Older Workers Against Discrimination Act change the language to "motivating factor." This does not seem problematic. *Price Waterhouse* held that if the employer proved it would have made the same decision regardless of discrimination, it was absolved of all liability. The CRA of 1991 and the Protecting Older Workers Against Discrimination Act change this to providing a declaratory judgment and costs and fees.

H.B. 3721 does not address the fact that the motivating factor standard may be overbroad. It seems that the standard flies in the face of reality. Is it not true that even absent any evidence to support such an inference, any jury could legitimately find, for example, that decisions made by all male decision makers were motivated in part by a woman's gender? How about a decision to discharge a seventy year-old employee? Can we really argue that decision makers, even those over forty or even sixty, would not be motivated, at least in part, by the employee's age? Even if this were the case, would any jury believe that age played no motivating role?[200] Social science research and common sense tell us that age, race, sex, color, religion, national origin, and disabilities motivate people.[201] Should that be unlawful when it did not affect the decision?

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199. Price Waterhouse v. Hopkins, 490 U.S. 228, 265–66 (1989) (O'Connor, J., concurring).

200. *See* Ronald C. Kessler et al., *The Prevalence, Distribution, and Mental Health Correlates of Perceived Discrimination in the United States*, 40 J. HEALTH & SOC. BEHAV. 208, 224 (1999) (noting that over sixty percent of respondents to a national survey perceived discrimination in their day-to-day lives).

201. *See, e.g.*, Robert L. Nelson et al., *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. L. & SOC. SCI. 103, 115–16 (2008) (arguing that the requirement of purposeful discrimination in employment law ignores modern social science research regarding the pervasiveness of unconscious bias in employment decisions); Norton et al., *supra* note 122, at 47; Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 269 (2006)

Consider the following hypothetical. A company has a policy of terminating every employee who comes to work intoxicated. This standard has been applied to employees of all ages, religions, races, colors, genders, and national origins. The company also has a report from a consultant that its employees are out of touch, and that it needs to "get younger." The company acknowledges the truth of the report, but rejects the advice because of the ADEA. Now, a sixty-five year-old employee comes to work intoxicated and the company, in accordance with policy, terminates the employee. Will a jury think that age was a motivating factor? If so, should the company that wished to "get younger," but did not act on it because of the law, be penalized for complying with a legitimate policy that ensured safety? Should motives that do not affect decisions be the basis of guilt? In a multi-cultural society that has not evolved to be the melting pot we all idealized in grammar school, is such a standard realistic? Assuming this is not realistic, but is nonetheless the law, will employers accept that costs and fees are now automatic in all cases and that the cost of settling such cases has risen expediently? Or, will employers attempt to avoid such cases? The best way to avoid discrimination is to have a homogeneous workforce. Could the on-call motivating factor instruction paradoxically lead to more discrimination?

The easiest way to solve this issue is to simply return to the legal standard articulated in *Price Waterhouse*. Employers can absolve themselves of liability if they can prove that the decision in question would have been made regardless of the protected class. Such a standard, we contend, is generally consistent with social science (and, perhaps, common sense). We also contend that this, of course, will not happen. That does not mean, however, that the issues cannot be resolved. In fact, they can be resolved by solving problem number three.

As our results imply, jurors in our study believed that answering "No" to the first question in the mixed-motive instruction ("Did plaintiff . . . establish . . . that his national origin was a motivating factor in the decision by defendant") was the same as answering "Yes" and then answering "Yes" to the question of whether the employer would have made its decision regardless of the protected class. In other words, jurors who answered "Yes" to both questions likely assumed they were finding in favor of the employer and not the employee. In one sense the jurors were correct: as it related to liability, the employer prevailed. What those jurors likely did not realize, however, is that by answering "Yes" to both questions they were, in

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(finding juror race influences peremptory challenge use despite decision makers' justifying their decisions with non-racial criteria).

fact, awarding litigating employees costs and fees. Similarly, the number of jurors who answered "Yes" to Question 1 was significantly higher when they could use the affirmative defense to avoid awarding damages.

It remains possible that jurors will find protected classes motivate decision makers even when they do not believe that the plaintiff was discriminated against or deserves any type of damage award. Accordingly, we have a simple proposal to solve problems three and four identified above. The special jury verdict sheet should state that answering "Yes-Yes" will result in the employer paying the plaintiff's costs and fees. Jurors who believe that the motivation was discrimination should not be affected by the change. They will award costs and fees. Conversely, jurors who believe that protected classes always motivate decisions as simply a cost of living in a diverse country, but saw no discrimination will answer "No" and award no costs and fees.

IV. CONCLUSION

Burden of proof assignments matter. The so-called motivating factor instruction will result in costs and fees being awarded significantly more often than in pretext cases or motivating factor cases without the defense. In cases where the motivating factor instruction is used without the defense, the plaintiffs have a significantly better chance of prevailing than they do in cases using the pretext or full motivating factor instruction. Our full proposal, we contend, solves all the current problems associated with the current burden of proof. First, by overturning *Gross*, all discrimination cases are now equal. Second, letting plaintiffs choose whether to use the motivating factor jury instruction will not only end the legal fiction of letting judges decide facts, it could make cases easier for plaintiffs to prove. Flipping burdens of proof is not a small change, as employers will be forced to prove a negative. If they do so, we contend jurors should only award damages, in the form of costs and fees, if they intend to do so.

APPENDIX

I. PRETEXT SCENARIO

Jury Instruction:

Plaintiff bases his lawsuit on Title VII of the Civil Rights Act of 1964, a law that makes it unlawful for an employer to discriminate against an employee on the basis of national origin. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that he was denied a promotion by Defendant because of his national origin.[202] *To determine that Plaintiff was denied a promotion because of his national origin, you must decide that Defendant would have promoted Plaintiff had he not been of Mexican national origin but everything else was the same.*

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, then you must find for Plaintiff. However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, then you must find for Defendant.

Special Verdict Sheet:

1. Did plaintiff Estefan Ruiz establish by a preponderance of the evidence that defendant discriminated against him in violation of Title VII of the Civil Rights Act of 1964 on the basis of his national origin with respect to the decision not to offer him a promotion in December 2003?

Yes ____ *No* ____

If you answered "no" to Question 1, sign the special verdict form on the last page. If you answered "yes" to Question 1, plaintiff is entitled to recover back pay damages. The parties have stipulated that the total amount of back pay to be awarded to plaintiff is $50,000. Check the box below to signify that the plaintiff is entitled to damages of $50,000 and then sign the special verdict form.

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202. We use national origin here, but it could be any of the seven protected classes: sex, race, color, national origin, religion, age, or disability.

II. MIXED-MOTIVE SCENARIO

Jury Instruction:

Plaintiff bases his lawsuit on Title VII of the Civil Rights Act of 1964, a law that makes it unlawful for an employer to discriminate against an employee on the basis of national origin. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that his national origin was a motivating factor in Defendant's decision not to offer him a promotion. A motivating factor is something that contributed to Defendant's decision.

If you find that Plaintiff has proved that his national origin contributed to Defendant's decision not to offer him a promotion, you must then decide whether Defendant proved by a preponderance of the evidence that it would have not offered him a promotion even if Plaintiff was not of Mexican national origin. If you find that the Defendant has proven that it would not have offered him a promotion even in the absence of discrimination, you must still enter a verdict for the Plaintiff but you may not award him damages.

Special Verdict Sheet:

1. Did plaintiff Estefan Ruiz establish by a preponderance of the evidence that his national origin was a motivating factor in the decision by defendant, Rochester Chronicle, Inc., not to offer him a promotion in December 2003?

Yes ____ *No* ____

You should answer the next question only if you answered "yes" to Question 1. If you answered Question 1 "no," you should not answer any further questions but sign this special verdict form on the last page and return the form to the clerk.

2. Did defendant establish by a preponderance of the evidence that the defendant would have treated plaintiff the same way even if the plaintiff's national origin had not played any role in the employment decision?

Yes ____ *No* ____

If you answered "yes" to Question 2, sign the special verdict form on the last page. If you answered "no" to Question 2, plaintiff is entitled to recover back pay damages. The parties have stipulated that the total

amount of back pay to be awarded to plaintiff is $50,000. Check the box below to signify that the plaintiff is entitled to damages of $50,000 and then sign the special verdict form.

III. MIXED-MOTIVE *WITHOUT* THE SECOND PRONG SCENARIO

Jury Instruction:

Plaintiff bases his lawsuit on Title VII of the Civil Rights Act of 1964, a law that makes it unlawful for an employer to discriminate against an employee on the basis of national origin. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that his national origin was a motivating factor in Defendant's decision not to offer him a promotion. A motivating factor is something that contributed to Defendant's decision.

If you find that Plaintiff has proved that his national origin contributed to Defendant's decision not to offer him a promotion, you must enter a verdict for the Plaintiff, even if you believe that there were other motivating factors that would have caused the Defendant not to offer him a promotion even in the absence of any discriminatory motivation.

Special Verdict Sheet:

1. Did plaintiff Estefan Ruiz establish by a preponderance of the evidence that his national origin was a motivating factor in the decision by defendant, Rochester Chronicle, Inc., not to offer him a promotion in December 2003?

Yes ____ *No* ____

If you answered "yes" to Question 1, plaintiff is entitled to recover back pay damages. The parties have stipulated that the total amount of back pay to be awarded to plaintiff is $50,000. Check the box below to signify that the plaintiff is entitled to damages of $50,000 and then sign the special verdict form.